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United States  
Circuit Court of Appeals

For the Ninth Circuit.

JAMES DUNSMUIR,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E.  
MUENTER, Collector of Internal Revenue),

Defendant in Error.

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Transcript of Record.

Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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**FILED**

APR 7 - 1914



No. 2386

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

ANDREW THORNE & WALTON C. WEBB,  
Esqrs., Attorneys for Plaintiff in Error,  
Mills Building, San Francisco, California.

JOHN W. PRESTON, United States Attorney, and  
EARL H. PIER, Assistant U. S. Attorney, At-  
torneys for Defendant in Error,  
U. S. Postoffice & Courthouse Building, San  
Francisco, California.

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*In the Circuit Court of the United States, Ninth Cir-  
cuit, Northern District of California.*

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal  
Revenue,

Defendant.

**Complaint.**

Plaintiff complains of the defendant above named and for cause of action alleges:

1. That the defendant, August E. Muentner, is now and has been since the first day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California and Northern District of California.

2. That previous to said first day of October, 1907, when said defendant, August E. Muentner, became the duly appointed, qualified and acting Collector of Internal Revenue, as aforesaid, John C. Lynch was and had been during all the times in this complaint mentioned up to October 1st, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California, and Northern District of California, and was succeeded on said 1st day of October, 1907, as Collector of Internal Revenue, as aforesaid, by the defendant, August E. Muentner.

3. That on or about the 31st day of January, 1900, at the [1\*] City, County and State of New York, Alexander Dunsmuir died, being a resident of Victoria, British Columbia, at the time of his death and having been a resident of said Victoria at all times, said decedent having been born in said British Columbia, and that said British Columbia was at all times the domicile of said decedent.

4. That said decedent died testate, leaving a last will and testament, dated December 21st, 1899, which by a judgment duly given, made and entered on the 24th day of February, 1900, by the Supreme Court of British Columbia (in Probate), was duly and originally proved and allowed and admitted to probate as the last will and testament of said Alexander Dunsmuir, deceased. That such judgment, and such proof, allowance and admission to probate has never

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\*Page-number appearing at foot of page of original certified Record.

been in whole or in part appealed from, revoked, set aside, modified or in any wise affected but that the same has become and is now absolute and final.

5. That thereafter and on, to wit, the 9th day of May, 1900, by a judgment and decree of the Superior Court of the City and County of San Francisco, State of California, a Court of competent jurisdiction, the said last will and testament of Alexander Dunsmuir, deceased, by duly authenticated copy was admitted to probate and thereafter and on, to wit, the 14th day of May, 1900, letters testamentary were duly issued by the said Superior Court to the plaintiff, James Dunsmuir. That thereafter, after due proceedings, in ancillary administration, the estate of said decedent *and* situated in the State of California was, by an order and decree, duly made, given and entered on the 3d day of June, 1901, by the said Superior Court of the City and County of San Francisco duly distributed to James Dunsmuir, the plaintiff herein, as the sole legatee named in the said last will and testament of Alexander Dunsmuir, deceased. That said decree [2] has become final and absolute. That said James Dunsmuir has now and has always had his domicile in British Columbia.

6. That the residuary personal property left by said testator by the terms of said last will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax (which estimate is for the purpose of this action asquiesced in by plaintiff) amounted in value to the sum of One Hundred Ninety-seven Thousand Nine Hundred and

Nineteen and 85/100 (\$197,919.85) Dollars.

7. That on the 15th day of October, 1906, the said John C. Lynch, assuming to act as such Collector of Internal Revenue as aforesaid, and under the Acts of Congress commonly known as the "War Revenue Law," of June 13, 1898 (also known as the Federal succession tax law), did by force and duress, exact, demand and collect from said James Dunsmuir, the plaintiff herein, the sum of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars, gold coin of the United States, claiming the same to be a lawful assessment under said Act on account of the legacy received by the said James Dunsmuir, the plaintiff herein, under the terms of the said last will and testament of Alexander Dunsmuir, deceased.

8. That the said tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars was imposed and assessed by the said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, on the sum of One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 (197,919.85) Dollars, the same being the alleged value of the share of said estate left to the said James Dunsmuir, a brother of said Alexander Dunsmuir, deceased, and the tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars being at the rate of One and 50/100 (\$1.50) Dollars for every One Hundred [3] (\$100.00) Dollars of said sum of One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 (\$197,919.85) Dollars.

9. That said sum of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars was paid

for the personal funds of James Dunsmuir, the plaintiff herein as aforesaid, involuntarily and under protest and protesting that he, the said James Dunsmuir, the plaintiff herein, was not nor was the estate of said Alexander Dunsmuir, deceased, nor was said legatee or said legacy liable to pay said tax.

10. That at the time of the payment of said tax as aforesaid, to wit, on or about the 15th day of October, 1906, the plaintiff served upon the said John C. Lynch as such Collector of Internal Revenue, a written protest in which the grounds of protest were specified therein, to wit: That no tax was due by law from the estate of said Alexander Dunsmuir or from said James Dunsmuir as residuary legatee thereof and that the legacy to the said James Dunsmuir of the residue of said estate had no clear value, as the same was burdened with the payment of an annuity of Twenty-five Thousand (25,000.00) Dollars to the widow of said deceased; that the value of said annuity was greater than the value of said legacy; that said decedent, Alexander Dunsmuir, was a British subject; that said decedent died in the State of New York; that he was domiciled at Victoria, British Columbia, where his will was probated and that said plaintiff succeeded to said legacy under the laws of Canada.

11. That thereafter and on, to wit, the 12th day of February, 1908, the plaintiff duly filed with the defendant, August E. Muentner, Collector of Internal Revenue of the United States, of the First Collection District of California, a duly verified claim for the refunding of said tax of Two Thousand Nine

Hundred Sixty-eight and 80/100 [4] (\$2968.80) Dollars, so collected as aforesaid and plaintiff then appealed to the Commissioner of Internal Revenue from the action and decision of said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, in holding said legacy liable to payment of said legacy tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars and in collecting the said legacy tax in the manner aforesaid, and plaintiff then represented to said Commissioner of Internal Revenue that the collection of said tax was unlawful and that the amount thereof should be refunded for the following reasons:

(a) That no tax is due by law from said estate of Alexander Dunsmuir, deceased, or from the said James Dunsmuir as residuary legatee thereof.

(b) That the legacy to the said James Dunsmuir, plaintiff herein, of the residue of said estate had no clear value, as the same was burdened with the payment of an annuity of Twenty-five Thousand (\$25,000.00) Dollars to the widow of said deceased; and, as was found by the Honorable Finlay Cook, Appraiser of Collateral Inheritance Tax in the Matter of said estate, the value of the said annuity was greater than the value of said legacy.

(c) That the decedent, Alexander Dunsmuir, was a British subject; that he died in the State of New York; that he was domiciled at Victoria, British Columbia, where his will was probated, and that said James Dunsmuir, plaintiff herein, succeeded to said legacy under the laws of Canada and that said James Dunsmuir, plaintiff herein, was and always had been

a British subject and that he resides and always has resided in British Columbia and was domiciled and has always been domiciled in said British Columbia, and [5] further that said tax was not a valid charge upon said legacy under the ruling of the Supreme Court of the United States as set forth in the cases of Moore vs. Ruckgaber, 184 U. S. 593, and Eidman vs. Martinez, 184 U. S. 578.

12. That said plaintiff is now and at all times has been a British subject; that said decedent, Alexander Dunsmuir, was at the time of his death and was at all times a British subject.

13. That the said legacy of plaintiff from the estate of said Alexander Dunsmuir, deceased, consisted wholly of personal property and was subject to and burdened with an annuity of Twenty-five Thousand (25,000.00) Dollars in favor of the widow of said Alexander Dunsmuir, deceased; that said legacy of plaintiff had no clear or taxable value, and that said legacy had no taxable residuum.

14. That the legacy Internal Revenue Tax imposed and collected by said John C. Lynch, the then Collector of Internal Revenue, was and is illegal and erroneous and without authority of law and should be refunded.

15. That said Commissioner of Internal Revenue disallowed and rejected said claim of plaintiff for the refunding of said tax on or about the 4th day of March, 1908.

16. That no part of said tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars has been refunded or repaid to plaintiff and

the whole of said sum of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars is still unpaid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Two Thousand Nine Hundred Sixty-eight and 80/100 (\$2968.80) Dollars together with interest thereon and for costs of suit.

ANDREW THORNE,  
Attorney for Plaintiff. [6]

State of California,  
City and County of San Francisco,—ss.

Andrew Thorne, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action and duly authorized to appear and act for him in all matters pertaining to this action; that said plaintiff is absent from said City and County of San Francisco and from said State of California and resides without the said City and County of San Francisco, State of California, to wit, in Victoria, British Columbia; that affiant is more familiar with the facts stated in the foregoing complaint than the said plaintiff and makes this affidavit for the above reasons in the place of plaintiff; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters that are therein stated upon information or belief and as to those matters that he believes it to be true.

ANDREW THORNE.





the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this county—or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of April in the year of our Lord one thousand nine hundred and eight and of our independence the 132d.

[Seal]

SOUTHARD HOFFMAN,  
Clerk.

By J. A. Schaertzer,

Deputy Clerk. [8]

United States Marshal's Office,  
Northern District of California.

I HEREBY CERTIFY that I received the within Summons on the 2d day of April, 1908, and personally served the same on the 2d day of April, 1908, upon August E. Muentzer, Collector of Internal Revenue, the defendant therein named, by delivering to and leaving with B. J. Haskins, the Chief Clerk of said August E. Muentzer, Collector of Internal Revenue, said Muentzer at the time of this service being in Washington, D. C., and without the Jurisdiction of this Court, said defendant named therein personally at the City and County of San Francisco in said

District, a copy thereof, together with a copy of the Complaint, attached thereto.

Dated at San Francisco this 2d day of April, 1908.

C. T. ELLIOTT,  
U. S. Marshal.  
By J. E. Lynch,  
Office Deputy.

[Endorsed]: Filed April 3d, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [9]

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*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector of Internal Revenue.

**Demurrer.**

Comes now the defendant in the above-entitled case and demurs to the complaint of plaintiff, on the ground:

I.

That the same does not state facts sufficient to constitute a cause of action against this defendant.

ROBT. T. DEVLIN,  
United States Attorney,  
Attorney for Defendant.

I hereby certify the foregoing demurrer is not interposed for the purpose of delay, but is interposed

in good faith, and that, in my opinion, the same is well founded in point of law.

ROBT. T. DEVLIN,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed April 10th, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[10]

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At a stated term, to wit, the July term A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday the 3d day of August, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector, etc.

**Order Overruling Demurrer, etc.**

Defendant's demurrer to the complaint herein came on this day to be heard and by consent of George Clark, Esq., Assistant United States Attorney, it is ordered that said demurrer be and the same is hereby overruled, with leave to the defendant to answer within forty-five days. [11]

*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

**Answer.**

Comes now the defendant and answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of plaintiff's complaint.

II.

Admits the allegations of paragraph II of plaintiff's complaint.

III.

As to the allegations of paragraph III of plaintiff's complaint, defendant admits that Alexander Dunsmuir died January 31st, 1900, in New York City, State of New York. Defendant has no knowledge, or information, or belief, as to the allegations of the said paragraph III that the said Dunsmuir was a resident of Victoria, B. C., at the time of his death, or that said place was his domicile at the time of his death, and placing his answer upon such ground, he denies each and all of said allegations.

IV.

As to the allegations of paragraph IV of the said

complaint [12] defendant alleges that he has no information or belief sufficient to enable him to answer said allegations, and placing his answer upon said ground, he denies each and all of the said allegations contained in the said paragraph; he denies that the said will was originally proved or was entitled to be originally proved in the Supreme Court of British Columbia.

V.

As to the allegations of paragraph V this defendant alleges that he is advised and believes, and upon information and belief does now state that the said Alexander Dunsmuir died a resident of the City and County of San Francisco, State of California, and that if ancillary administration upon the estate of said deceased was allowed by the Superior Court of the State of California, in and for the City and County of San Francisco, the same was without jurisdiction and of no effect.

VI.

Defendant admits the allegations of paragraph VI of plaintiff's complaint.

VII.

Admits the estate of the said Alexander Dunsmuir, deceased, paid the legacy tax of Two Thousand Nine Hundred Sixty-eight and 80/100 (2968.80) Dollars imposed and assessed as set forth in paragraph VII of said complaint upon the legacies of personal property mentioned and described in said paragraph VII and in said paragraph VI of the plaintiff's complaint. Defendant denies that he collected the said taxes or any portion thereof by force or duress, or by force or

duress. Defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by defendant in exacting, demanding or collecting the said tax. [13]

## VIII.

Admits the allegations of paragraph VIII of plaintiff's complaint.

## IX.

As to the allegations of paragraph IX of plaintiff's complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the allegations of said complaint to the effect that the plaintiff in this action owns or has any interest in the alleged cause of action set forth in the complaint, and placing his answer upon that ground, he denies that plaintiff owns or has any interest whatever in the said alleged cause of action set forth in the complaint.

## X.

Admits the allegations of paragraph X of plaintiff's complaint.

## XI.

Admits the allegations of paragraph XI of plaintiff's complaint.

## XII.

Defendant has no information or belief sufficient to enable him to answer the allegations of paragraph XII of said complaint, and placing his answer upon said ground, he denies each and every allegation in said paragraph contained.

## XIII.

Defendant has no information or belief sufficient

to enable him to answer the allegations of paragraph XIII of said complaint, and placing his answer upon said ground, he denies each and every allegation in said paragraph contained, and denies that said legacy has no clear or taxable value, and denies that said legacy has no taxable residuum. The defendant alleges that the residuary personal property taxed by this defendant amounts to One Hundred Ninety-seven Thousand Nine Hundred Nineteen and 85/100 [14] (197,919.85) Dollars; that said sum was the clear and actual value of the said personal property passing at the death and by virtue of the will of the said deceased to the said James Dunsmuir, in immediate possession and enjoyment.

## XIV.

Admits the allegations of paragraph XV of plaintiff's complaint.

## XV.

Admits the allegations of paragraph XVI of plaintiff's complaint.

WHEREFORE defendant prays that defendant take nothing by this action, and for costs of suit.

ROBT. T. DEVLIN,

United States Attorney,

Attorney for Defendant. [15]

State and Northern District of California,  
City and County of San Francisco,—ss.

August E. Muentzer, being first duly sworn, deposes and says:

That he is the Collector of the Internal Revenue of the United States, for the First Collection District of California, and the defendant herein; that he has



read the foregoing Answer and knows the contents thereof; that the same is true except as to the matters which are therein stated on information and belief, and that as to those matters, he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, 1908.

[Seal]

W. B. MALING,  
Deputy Clerk U. S. Circuit Court, Northern District  
of California.

Service of the within Answer by copy admitted this 9th day of Oct. 1908.

ANDREW THORNE,  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy. [16]

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*In the Circuit Court of the United States, Ninth  
Circuit, Northern District of California.*

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector, etc.,

Defendant.

**Waiver of Jury.**

It is stipulated by and between the parties hereto that a jury in the above-entitled case may be, and the same is hereby waived.

Dated March 2d, 1911.

ANDREW THORNE,  
Attorney for Plaintiff,  
ROBT. T. DEVLIN,  
Attorney for Defendant.

[Endorsed]: Filed Mar. 3, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [17]

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At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 9th day of January, in the year of our Lord one thousand nine hundred and 12. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector, etc.

**Order Amending Complaint.**

\* \* \* \* \*

Upon motion of Mr. Thorne, it was ordered that the complaint may be amended on its face by inserting the word "alleged" before the word "value" on line 1 of page 4.

\* \* \* \* \*

[18]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal  
Revenue,

Defendant.

**Judgment.**

This cause having come on regularly for trial upon the 9th day of January, 1912, and on the 20th day of November, 1912, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties; Andrew Thorne, Esq., appearing as attorney for the plaintiff, and Earl H. Pier, Esq., Assistant United States Attorney appearing on behalf of the defendant; and evidence, oral and documentary, on behalf of the respective parties having been introduced and closed, and the cause after arguments by the attorneys for the respective parties having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having ordered that judgment be entered herein in favor of the defendant and against the plaintiff and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff take nothing by this action,

that defendant go hereof without day, and that defendant do have and recover of and from the plaintiff his costs herein taxed at \$53.75.

Judgment entered May 12, 1913.

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [19]

*In the District Court of the United States for the  
Northern District of California.*

No. 14,703.

JAMES DUNSMUIR

vs.

AUGUST E. MUENTER, Collector of Internal  
Revenue.

**Certificate to Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 12th day of May, 1913.

[Seal]

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed May 12, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 3d day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector, etc.,

Defendant.

**Order for Filing Oral Opinion Nunc Pro Tunc.**

It appearing that the Oral Opinion of the Court heretofore rendered judgment herein was not filed at the date of its rendition, and that such filing should have been had;

Now, on motion of the plaintiff it is ordered that a copy of said Opinion be filed herein *nunc pro tunc* as of May 12, 1913, the date of its rendition. [20a]

*In the District Court of the United States, Northern  
District of California, Second Division.*

Hon. WM. C. VAN FLEET, Judge.

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal  
Revenue,

Defendant.

**Oral Opinion.**

MONDAY, MAY 12, 1913.

ANDREW THORNE, for Plaintiff.

ROBERT T. DEVLIN, United States Attorney  
and EARL H. PIER, Assistant United  
States Attorney, for Defendant.

The COURT (Orally.)—The case of James Dunsmuir vs. August Muentner, as Collector of Internal Revenue for this District, is an action by the plaintiff to recover a certain sum paid as an inheritance tax assessed under the War Revenue Act of 1898 on property passing to him under the will of his brother, Alexander Dunsmuir. The case involves three propositions:

(1) Was the payment of the tax by the plaintiff a voluntary payment so as to preclude a recovery thereof in this action?

(2) Was the legacy passing to the plaintiff under the decree of distribution burdened with an annuity in favor of the widow of the testator, and, if so, was

the effect of this burden such as to leave no clear value of the legacy subject to be taxed under the Act?  
[20b]

(3) Was the domicile of Alexander Dunsmuir, the testator, at the time of his death, in this State or in British Columbia?

As to the first question, I have little, if any, doubt that the tax must be held to have been one paid involuntarily. It is true that there were no coercive measures resorted to or required, but the tax was paid under formal protest, and I am satisfied that in an action to recover under this Act that is sufficient to constitute it an involuntary payment such as to entitle the party unjustly taxed to sue and recover on establishing the fact of its not having been properly levied.

Upon the second question, whether the legacy or inheritance was encumbered by an annuity in favor of the widow of the deceased, and was therefore not susceptible of the determination of its clear value, as required by the Act in question, I am quite as well satisfied that it is not open to that objection. The will of Alexander Dunsmuir devised the property upon which the tax was levied to the plaintiff here absolutely, without condition, and without any charge upon it of any character. Alexander Dunsmuir, it seems, had made no provision by his will for his widow, whom he had married a short time before his death. She set up, or threatened, a claim against his estate, and, after negotiations, James Dunsmuir, the legatee, entered into a contract with her by which he undertook, in consideration of her waiving all claim

against the estate of the decedent, to pay her a certain annual payment,—I think it was \$25,000 a year. This contract recited, it is true, that while Alexander Dunsmuir had died without making provision for his wife, nevertheless it had been understood between him and his brother, the legatee, that the latter should care for her; but there was nothing in the nature of the contract or in the circumstances under which it was made, which, in my view, [20c] constituted it a charge against the estate of the decedent. It was purely a personal, contractual obligation on the part of James Dunsmuir to make this payment to the widow during her life, in consideration of her waiver of her claim and her agreement not to attempt to secure other rights from the estate of the decedent, which under the will was devised entirely to him. The decree of distribution, while it refers incidentally to the making of this contract for the benefit of the widow, transmits the title to the property subjected to the tax to the devisee without any condition or restraint of any character; and I am satisfied that it must be held that it passed to the devisee absolutely clear, so far as the law is concerned with which we are here dealing, of any charge which would affect the ascertainment and determination of that clear value of the legacy required to make it subject to the tax.

That leaves only the third question for consideration as to the domicile of the decedent at the time of his death. As claimed, if he were domiciled in British Columbia, the property would not be subject to tax under this Act. The question as presented in the record is very largely a question of fact, and it rests



to a considerable extent, if not wholly, upon declarations appearing by the evidence to have been made by the decedent, both oral and in writing. Of the first class, the oral declarations, there is a considerable amount of testimony tending to show that Dunsmuir, who was born in Victoria, British Columbia,—where his family resided and had large interests,—lived there during a considerable part of his younger manhood, but subsequently—about 1878-9—came to San Francisco, where his fathers' house had large interests in the coal trade, of which he took the management, and where he spent a [20d] very considerable portion of his time. I am inclined to think that the evidence preponderates in favor of his having spent the greater portion of his time here during each year. During a great portion of that time, and up to a period very recently antedating his death, he lived in San Francisco at different periods at the Pacific Union Club, of which he was a member, at the Occidental Hotel, the Palace Hotel, and at other places, maintaining quite an establishment of apartments, and retaining those places of residence during his absences from the city as well as while here. He would go to British Columbia periodically, where doubtless his business relations called him, and would remain there for a shorter or longer period as the exigencies of his business required; and it appears that, aside from the apartments that were provided for him, when desired, in his mother's home in Victoria, he had, as well, apartments at the Driard Hotel in that city, which he maintained and kept throughout the entire year,

whether there or not. That continued to be the course of his life up to a date shortly prior to his death.

The evidence tends to show, through the statements of more or less intimate friends, that Dunsmuir was a very ardent Englishman, that he had that great love of the flag which is found to be very strongly implanted in the breasts of that race; that he scorned the idea of changing his allegiance, and that more or less frequently in conversations, in a general way, referred to Victoria, British Columbia, as his home. The statements from these witnesses, however, in large part relate to the earlier period of his residence in San Francisco. But along toward the latter part of his residence in this State he maintained an establishment in San Leandro, in Alameda County, where the lady whom he subsequently married had her residence, and was there a great deal of the time. Shortly previous [20e] to his death he married this lady and in connection with the preparations and discussion of his purpose he referred to San Leandro as his home.

It also appears that some years prior to his death the corporation known as R. Dunsmuir Sons, wholesale dealers in and importers of coal here, was organized, and Alexander Dunsmuir became one of the incorporators of that corporation. In the articles of incorporation it is recited that his residence is San Francisco, and those articles of incorporation, as required by the law, were acknowledged and verified before a notary public.

Subsequently when his will was drawn, which was

a short time previous to his death, it was recited in the opening clause, not that his residence was in San Francisco, but language which imported that fact. The will recites, in the usual form, "I, Alexander Dunsmuir, of San Francisco," etc.

When his marriage license was taken out the declaration made as to his residence was as being in Alameda County. In both the registry of the church where he was married, and in the certificate of marriage, his residence is given as Alameda County.

Now, the question arises under evidence of this character, what was the domicile of the decedent? Of course domicile is not entirely synonymous with residence, but the two are interchangeably used in common parlance, and, of course, while a man may have a domicile separate and apart from his residence, the fact not being made clear to the contrary, his domicile is presumed to follow his residence. This is especially true where it is maintained for a considerable period and under circumstances such as are here developed, disclosing large business interests at the place of residence. I have given the entire record a very careful examination, [20f] and I have reached the conclusion that I cannot ignore the repeated declarations made under the most solemn circumstances, such as the recital in the articles of incorporation of the corporation of which the decedent became a director, and in that more solemn form found in his will, and as well the declarations contained in his marriage license, as also in his marriage certificate. The significance and force of these recitals cannot be lightly cast aside, and I feel driven to the conclusion

that the evidence preponderates in favor of the conclusion that Dunsmuir must be regarded as having been domiciled in California at the time of his death.

Counsel for the plaintiff undertakes to belittle the character of these more formal declarations in these several writings. It appears that in the marriage license deceased's residence was given as San Leandro, whereas in the marriage certificate and in the registry of the church where the marriage took place it was given merely as Alameda County, and, as further urged, the recital in the will is that his residence is San Francisco. But I set very little store and attach very little significance to these somewhat insignificant differences in the designation of his particular point of residence. The fact remains, and which I think is the main consideration, that the points referred to were all within this State, and must be taken as having evidenced the purpose of the decedent to declare himself a resident domiciled within the State.

In view of this conclusion the tax must be held to have been competently levied. The judgment will accordingly go for the defendant for its costs.

[Endorsed]: Filed Mar. 3, 1914, *nunc pro tunc*, May 12, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20g]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E. MUEN-  
TER, Collector of Internal Revenue),

Defendant.

**Substitution of Defendant.**

WHEREAS, Joseph J. Scott, has been appointed Collector of Internal Revenue of the United States for the First Collection District of California, in the place and stead of August E. Muentner, and is now the duly, appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State of California, and Northern District of California;

NOW, THEREFORE, it is hereby stipulated and agreed that said Joseph J. Scott, as such collector, be, and he is hereby substituted as defendant in the above-entitled action in the place of said August E. Muentner.

Dated this 26th day of September, 1913.

ANDREW THORNE,  
Attorney for Plaintiff.

BENJ. L. MCKINLEY,  
United States Attorney,  
Attorney for Joseph J. Scott, Collector of Internal  
Revenue (Substituted in Place of August E.  
Muentner, Collector of Internal Revenue), De-  
fendant. [20h]

In accordance with the foregoing stipulation it is hereby ordered that Joseph J. Scott, as Collector of Internal Revenue of the United States for the First Collection District of California, be, and he is hereby, substituted as defendant in the above-entitled action in the place of August E. Muentner and that this action be, and the same is hereby, continued against Joseph J. Scott, as such collector, defendant.

Dated: September 27th, 1913.

WM. C. VAN FLEET,  
Judge.

Received a copy of the within this 27th day of September, 1913.

BENJ. L. MCKINLEY,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed Sep. 27, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20i]

*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E.  
MUENTER, Collector of Internal Revenue),  
Defendant.

**Bill of Exceptions.**

TO BE USED ON APPEAL FROM THE JUDG-  
MENT HEREIN BY WRIT OF ERROR  
SUED OUT BY THE PLAINTIFF HEREIN  
TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS, NINTH JUDICIAL  
CIRCUIT.

The trial of the above-entitled cause was begun on January 9th, 1912, before the Court sitting without a jury, a jury having been duly waived by the parties thereto, Andrew Thorne, Esq., appearing as attorney for the plaintiff, and Robert T. Devlin, United States Attorney, appearing as attorney for defendant.

The trial of said cause was concluded on the 20th day of November, 1912, and on the 12th day of May, 1913, the Court rendered Judgment in said cause adjudging that plaintiff take nothing thereby and that the defendant have and recover of and from the

plaintiff his costs of suit, which judgment was entered on the 12th day of May, 1913.

At the trial of said cause the following proceedings were had:

Counsel for plaintiff offered in evidence an exemplified copy of the decree of settlement of final account and [21] final distribution in the matter of the estate of Alexander Dunsmuir, deceased, in the Superior Court of the State of California, in and for the City and County of San Francisco, which was admitted in evidence and marked Plaintiff's Exhibit No. 1, same being admitted for what it is worth, it not being admitted to prove the residence of the deceased at the time of his death, nor as fixing the taxable value of the property, nor as evidence of any recital in reference to the contract, Plaintiff's Exhibit 4 as a moving consideration.

Said document reads as follows:

**Plaintiff's Exhibit No. 1—Decree of Superior Court.**

*“In the Superior Court of the State of California, in and for the City and County of San Francisco.*

DEPARTMENT 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

DECREE OF SETTLEMENT OF FINAL ACCOUNT AND OF FINAL DISTRIBUTION.

James Dunsmuir, as Executor of the Last Will and Testament of Alexander Dunsmuir, deceased, in and for the State of California, having on the 23d day of May, 1901, rendered and filed herein a final account and report of his administration of said



Estate in the State of California, which said account was for a final settlement, and said James Dunsmuir, as Executor as aforesaid, having filed with said account a petition for the final distribution of said Estate, and said account and petition having on the 3d day of June, 1901, come on regularly to be [22] heard due proof having been made to the satisfaction of the Court that notice had been given of the settlement of said account and of the hearing of said petition in the manner and for the time required by law;

And it appearing that said account of said Executor as rendered and filed herein is in all respects true and correct and that it is supported by proper vouchers;

That the said residue of money in the hands of said Executor belonging to the Estate of said deceased at the time of filing said final account was the sum of \$25,120.70, gold coin of the United States;

That since the rendition of said final account said Executor has not received to or for the use or benefit of said estate any additional sum of money or property whatever and has not made any disbursements whatever for the account of said Estate, and that for that reason he has not presented or filed herein any account supplemental to his said final account so heretofore rendered and filed herein;

That the sum of \$6,595.15 has been heretofore expended by him as necessary expenses of administration, the vouchers whereof together with a statement of such disbursements have been presented and filed, and said statement is now settled and allowed and all of said payments are hereby approved by this Court;

And it appearing that all claims and debts against said decedent and said Estate and all taxes against said Estate have been fully paid and discharged;

That said testator, Alexander Dunsmuir, died on the 31st day of January, 1900, at the City, County and State of New York, and at the time of his death he was a British subject [23] and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, as appears from the evidence, both oral and documentary, introduced upon the hearing of the petition for distribution, and that said testator at the time of his death left property in the City and County of San Francisco, State of California;

That said Alexander Dunsmuir left a Last Will and Testament dated December 21st, A. D. 1899, wherein the said James Dunsmuir was appointed the Executor thereof;

That said Last Will and Testament of said Alexander Dunsmuir, deceased, was duly approved, allowed and admitted to probate in the Province of British Columbia by a judgment and decree dated February 26th, 1900, in the Supreme Court of British Columbia, and that said Last Will and Testament was executed according to the laws of the State of California, and also according to the law of the domicile of said testator.

And it appearing that said judgment and proof, allowance and admission to probate of said Last Will and Testament of said deceased in said Province of British Columbia has never been in whole or

in part appealed from, revoked, set aside, modified or in any wise affected or at all, but that the same has become and is now absolute;

That the aforesaid Supreme Court of British Columbia was at all the times herein mentioned and is a court of competent and general jurisdiction and was at all said times and is a court of competent jurisdiction in the premises to pronounce, give and make such decree and the proof, allowance and admission to probate of the aforesaid will so duly and regularly given and made on the 26th day of February, 1900, and that said court [24] was and is the domiciliary forum in the premises;

That on the 26th day of April, A. D. 1900, said James Dunsmuir, the person named in said Will as Executor thereof and a person interested in said Will produced and filed in this Court a copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof, duly authenticated, together with his petition for the issuance to him of letters testamentary thereon;

That thereafter such proceedings were had and taken in this Court in the matter of said Estate of said deceased that on or about the 9th day of May, 1900, it was ordered, adjudged and decreed by the judgment and decree of this Court that said copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof so duly authenticated and produced and filed in this Court on the 24th day of April, 1900, as aforesaid, be admitted to probate as the last Will and Testament of said Alexander Dunsmuir, deceased, with the same force and effect

as if said Will had been first admitted to probate in this State, and that such judgment and decree was regularly given and made;

That by virtue of said judgment and decree last aforesaid letters testamentary were ordered to be issued to said James Dunsmuir upon his giving a bond in the sum of \$308,000 as required by law and that thereafter on the 14th day of May, 1900, letters testamentary were duly issued to said James Dunsmuir, as Executor as aforesaid;

That said James Dunsmuir did give said bond so required of him by law for the faithful performance and execution of the duties of the trust as such Executor, with sufficient surety; [25]

That said bond was in the manner and form and duly approved as required by law and that said James Dunsmuir duly qualified as such Executor and entered upon the discharge of his duties as such and that ever since said time has been and now is the sole Executor of the said Last Will and Testament of said deceased in and for the State of California;

That immediately after his said appointment and qualification as Executor as aforesaid he caused to be published in a newspaper of general circulation printed, published and circulated in said City and County of San Francisco, a notice to the creditors of said decedent and all persons having claims against said Alexander Dunsmuir to exhibit and present their said claims against the said deceased according to law;

That more than ten months have elapsed since

the first publication of said notice to creditors;

That a decree showing due and legal notice to the creditors of and all persons having claims against said decedent and his said Estate has been heretofore duly and regularly given, made and entered by this Court;

That all debts of said deceased and of said Estate and all expenses of administration thereof and all taxes that have attached to or accrued against said Estate and its property have been paid and discharged and that said Estate is now in a condition to be closed.

And it appearing in and by the terms of said Last Will and Testament of said deceased that all the estate and property of the said deceased, both real and personal, wheresoever, situated, was given, devised and bequeathed to James Dunsmuir, a brother of said deceased.

And it appearing to the satisfaction of this Court that said Alexander Dunsmuir, deceased, at the time of his death left him surviving as his only heirs at law the following [26] persons, that is to say:

Josephine Dunsmuir, widow of said deceased, and  
Joan Olive Dunsmuir, mother of said deceased;

That said James Dunsmuir, as Executor as aforesaid, has this day filed in this Court in writing his waiver and renunciation of all commissions and compensation for his services as such Executor and has also made such waiver and renunciation in open court at this hearing;

And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his

brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir, was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in furtherance of said previous understanding and agreement entered into an agreement with the said Josephine Dunsmuir, in full settlement of her claims as widow upon the Estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime.

And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax; [27]

It is now, therefore, ordered that out of and from the rest, residue and remainder of the property now remaining in the hands of said James Dunsmuir, as Executor as aforesaid, there be paid the following sums of money, that is to say;

For estimated expenses of closing the said Estate of said deceased, five dollars:

To Messrs. Wilson & Wilson, as attorneys for said Executor in the administration of said estate the

sum of five thousand dollars, to be paid to them in full for all professional services rendered in said Estate and to said Executor as such to the date hereof, leaving a balance of \$20,115.70 now in the hands of said Executor belonging to said Estate;

And it appearing to the satisfaction of this Court that said Estate is now in a condition to be closed and finally distributed to the persons lawfully entitled thereto;

Now, therefore, it is ordered, adjudged and decreed that said final account of said James Dunsmuir, as Executor of the Last Will and Testament of said Alexander Dunsmuir, deceased, be and the same is hereby settled, allowed and approved as presented and filed herein.

It is further ordered, adjudged and decreed that all the rest, residue and remainder of said Estate hereinafter particularly described and any other property known or not known or discovered which may belong to the said Estate of said Alexander Dunsmuir, deceased, or in which said Estate may have any interest, be and the same is hereby distributed to James Dunsmuir, said brother of said deceased, and that the same is not subject to the payment of any collateral inheritance tax:

The following is a particular of the said residue [28] of said estate referred to in this decree and of which distribution is now ordered, as aforesaid, that is to say:

Twenty thousand one hundred and fifteen dollars and seventy cents in cash;

Four thousand nine hundred and ninety-eight

shares of the capital stock of the R. Dunsmuir's Sons' Company, a corporation organized and existing under the laws of the State of California.

Done in open court this 3d day of June, A. D. 1901.

JAS. M. TROUT,  
Judge.

Recorded October 3d, 1901.

[Endorsed]: Filed Jun. 3, 1901. Wm. A. Deane,  
Clerk. By V. F. Northrop, Deputy Clerk.

WM. A. DEANE,  
Clerk.

By V. F. Northrop,  
Deputy Clerk.

Office of the County Clerk,  
Of the City and County of San Francisco.

I, Wm. A. Deane, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the decree of settlement of account and of final distribution in the matter of the Estate of Alexander Dunsmuir, deceased, now on file and of record in my office.

Witness my hand and the seal of said Court, this 3d day of June, A. D. 1901.

[Seal]

WM. A. DEANE,  
Clerk.

By V. F. Northrop,  
Deputy Clerk.

Recorded Oct. 3d, 1901. [29]



*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

DEPARTMENT NO. TEN—PROBATE.

No. 240—N. S.

In the Matter of the Estate of ALEXANDER  
DUNSMUIR,

Deceased.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the foregoing to be a full, true and correct copy of the original Decree of settlement of final account and of final distribution, on file and of record in my office in the above-entitled matter. That the same constitute a full and complete exemplification of the said above-named decree in the same matter, and of the whole thereof.

All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this fourth day of January, 1912. 190

[Seal]

H. I. MULCREVY,

County Clerk and ex-officio Clerk of the Superior  
Court.

I, E. P. Mogan, Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that said Court is a Court of Record having a Clerk and

Seal. That H. I. Mulcrevy, who has signed the annexed attestation, is the duly elected and [30] qualified County Clerk of the City and County of San Francisco, and was, at the time of signing said attestation, ex-officio Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this Fourth day of January, 1912. A. D. 190

E. P. MOGAN,

Presiding Judge of the said Superior Court.

State of California,

City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the Honorable E. P. Mogan, whose name is subscribed to the preceding certificate, is presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, duly elected and qualified, and that the signature of said Judge to said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, this fourth day of January, 1912, A. D. 190

[Seal]

H. I. MULCREVY,  
County Clerk and Clerk of the Superior Court.”

**[Testimony of Mountford S. Wilson, for Plaintiff.]**

MOUNTFORD S. WILSON, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am an attorney at law and have been practicing here a number of years. I knew Josephine Dunsmuir and also [31] James Dunsmuir. I recognize the agreement which is now handed to me (witness being handed Plaintiff's Exhibit No. 4, which is agreement between James Dunsmuir and Josephine Dunsmuir, dated December 1st, 1900). That agreement was signed by Josephine Dunsmuir and James Dunsmuir. I had a number of interviews with James Dunsmuir.

“Mr. THORNE (Counsel for Plaintiff).—Q. Mr. Wilson, you stated just now that Mrs. Dunsmuir was dissatisfied with some arrangement that Mr. Alexander Dunsmuir and Mr. James Dunsmuir had with reference to her support; did she want more? A. Yes. Q. Did you tell James Dunsmuir that? A. Yes.”

As a result of these interviews the said agreement was consummated. I know the residence of James Dunsmuir. He was a resident of Victoria, British Columbia. I know the residence of Alexander Dunsmuir. He was a resident of Victoria, British Columbia.

On cross-examination the witness testified as follows:

I knew Alexander Dunsmuir for about ten years before he died. I think his rooms were mostly in

(Testimony of Mountford S. Wilson.)

the Pacific Union Club. I am not certain whether or not he lived in the old Grand Hotel for a while. He had a business here and was the manager of Robert Dunsmuir & Sons. He spent the greater part of his time in this State. He was the manager of the coal business of Dunsmuir and Sons. I do not know how long he had been manager. During the latter part of his life he bought a place, something like fifty or one hundred acres, at San Leandro and gave it to his wife. He built a house on this property. I should say the cost of the house was \$30,000 or \$40,000.

On redirect examination the witness testified as follows: [32]

I have been up to Victoria and have seen James Dunsmuir there. The bulk of the Dunsmuir business consists of coal mines and large tracts of land in British Columbia. The business of the Dunsmuir's down here in San Francisco was merely a sales agency for their coal and a branch of their business. The house at San Leandro, about which I have spoken, was built for a Mrs. Wallace who subsequently became his wife just before his death. The title to the whole property was taken in the name of Mrs. Wallace. I presume they lived there together but she was not his wife at the time the conveyance was made. They were living together many years before they married. He married her six weeks before he died.

[Testimony of Albert W. Mowbray, for Plaintiff.]

ALBERT W. MOWBRAY, called as a witness for plaintiff, after being duly sworn, and after duly qualifying as an expert, testified as follows:

I am a consulting actuary.

Mr. THORNE (Counsel for Plaintiff):

Q. Assuming a person to be 49 years and one month, on the 31st day of January, 1900, what would be the present value of an annuity of \$25,00 per year, payable in monthly installments during the life of that annuity?

The COURT.—During her expectancy?

Mr. THORNE.—Yes, sir.

A. Assuming that mortality follows the combined experience table of mortality, which is the table provided by the law of the State of California for inheritance tax appraisals, and the rate of interest was in that statute 5 per cent, the present value of an annuity of \$25,000 per annum, payable monthly, the first payment immediately, during the continuance [33] of the life of a party aged 49 years, nearest birthday, would be \$302,607.50.

Mr. THORNE.—Q. What table did you refer to?

A. The combined or Actuaries Experience Table of Mortality, and 5 per cent interest, which is the basis prescribed by the inheritance tax law of the State of California. An annuity for \$25,000.00 payable monthly, to a party aged 49 years, nearest birthday, according to the Combined Experience Table of Mortality, 6 per cent interest, the present value would be \$277,422.50. The same annuity, the same mor-

(Testimony of Albert W. Mowbray.)

tality experience, but a 7 per cent interest rate, the present value would be \$255,685.

On cross-examination the witness testified as follows:

Mr. PIER.—Q. What is the usual rate of interest used by insurance companies in calculating annuities?

A. They usually use not higher than  $3\frac{1}{2}$  per cent. I think generally 3 per cent. They also use a table which shows a very much longer life than the Actuaries Experience Table because their experience with the annuities is that the class of people generally who take annuities are long-lived people; and they also take a low rate of interest because they want a rate of interest low enough so that they will not fail in carrying out their contracts.

Q. Why should they use such a low percentage as 3 per cent?

A. Insurance companies have to sustain the test of the various States for solvency, for one thing, and the highest rate I know of that is allowed in a test of solvency is  $3\frac{1}{2}$  per cent. The annuity business, due to the particularly long life of annuities, has generally been at least not a profitable business, and the lower the rate of interest the [34] higher the value of the annuities, so they want to increase their charges for annuities. A great many of the annuities in American companies are sold in Europe where the returns on investments are low and the rate they have to compete with corresponds.

**[Testimony of Walter A. Gompertz, for Plaintiff.]**

WALTER A. GOMPERTZ, called as a witness for plaintiff, after being duly sworn, testified as follows:

I know Mr. James Dunsmuir, the plaintiff in this action, and I have known him for twenty-two years. I have had business connections with him. I was employed in the office here in San Francisco for twenty-two years in various capacities. For about one year and a half or two years preceding the death of Josephine Dunsmuir I placed to her credit in the old London and San Francisco Bank about the sum of \$2,000.00 each month, which sums were paid out of the funds of James Dunsmuir.

As the agent of James Dunsmuir I received a notice to pay the inheritance tax addressed to Mr. Dunsmuir from Mr. John C. Lynch, as Collector of Internal Revenue of this District. This notice which is handed to me is the notice (the witness being handed Plaintiff's Exhibit No. 2, which is demand for payment of tax).

Counsel for plaintiff offered in evidence said demand for payment of tax, which was admitted in evidence and marked Plaintiff's Exhibit No. 2. Said document reads as follows:

[Plaintiff's Exhibit No. 2—Notice of and Demand  
for Taxes Assessed.]

“James Dunsmuir Executor—Victoria. Duplicate.

NOTICE OF AND DEMAND FOR TAXES  
ASSESSED.

UNITED STATES INTERNAL REVENUE,  
OFFICE OF THE COLLECTOR OF  
INTERNAL REVENUE.

First District, State of California, October 4th, 1906.  
List for Month of August, 1906.

Div.— [35]

M. Estate of Alexander Dunsmuir,  
San Francisco.

You are hereby notified that a tax, under the Internal Revenue Laws of the United States, amounting to \$2,968 80/100 Dollars, the same being a tax upon legacies, has been assessed against you by the Commissioner of Internal Revenue, and transmitted by him to me for collection. Demand is hereby made for this tax. This tax is due and payable on or before the 15th day of October, and unless paid within ten days after this notice and demand it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.



Payment may be made to John C. Lynch at San Francisco.

JNO. C. LYNCH,  
Collector.

WILSON & WILSON, Attys.,  
1860 Webster.

Bring this notice with you."

Counsel for plaintiff then offered in evidence protest on payment of tax, which was admitted in evidence and marked Plaintiff's Exhibit No. 3. Said document reads as follows:

**[Plaintiff's Exhibit No. 3—Protest on Payment of Tax, Dated October 15, 1906.]**

"San Francisco, Cal., October 15th, 1906.

John C. Lynch, Esq.,  
Collector of Internal Revenue,  
First District of California.

Dear Sir:—

In paying you herewith the sum of \$2,968.50, claimed by you to be due for a tax on legacies in the Matter of the Estate of Alexander Dunsmuir, deceased, I make said payment under protest and solely to avoid the collection of said amount by compulsory process, with added penalties, as threatened by you in your Notice and demand for Taxes [36] assessed, dated October 4th, 1906. The ground of said protest are:

1. That no tax is due by law from said Estate or from myself as residuary legatee thereof.
2. That legacy to myself of the residue of said Estate had no clear value, as the same was burdened

(Testimony of Walter A. Gompertz.)

with the payment of an annuity of \$25,000 to the widow of said deceased; and, as was found by Hon. Finlay Cook, Appraiser of Collateral Inheritance Tax, in the matter of said Estate, the value of the annuity was greater than the value of the legacy.

3. Alexander Dunsmuir, said deceased, was a British subject; he died in the State of New York; he was domiciled at Victoria, B. C., where his will was probated, and I succeeded to said legacy under the laws of Canada.

Yours respectfully,

JAMES DUNSMUIR,

By WALTER A. GOMPERTZ,

Agent."

The witness, continuing, testified as follows:

Mr. THORNE (Counsel for Plaintiff):

Q. Did you pay that tax, Mr. Gompertz?

A. Yes, sir.

Q. As the agent of James Dunsmuir?

A. Yes, sir.

Q. And from his personal funds? A. Yes, sir.

Q. You knew Alexander Dunsmuir, in his lifetime, did you not? A. Yes, sir.

Q. How many years did you know him?

A. 10 years.

Q. Did you know of what place he was a resident at the time of his death?

A. Victoria, British Columbia.

Q. How do you know that? A. He said so.

Q. He told you so?

A. Yes, in this way—that he wanted his name to

(Testimony of Walter A. Gompertz.)

be put in the Directory as President of R. Duns-  
muir's [37] Sons Company of San Francisco, re-  
siding in Victoria, British Columbia.

Q. And do you know whether that was put in the  
Directories of San Francisco, the fact that he was  
a resident of Victoria, British Columbia.

A. Yes, sir.

The COURT.—Q. He actually lived in this State  
during that time, did he not?

A. He was here off and on.

Q. Well, he was here the most of the time, was he  
not? A. No, sir.

Q. Did he not live at the Pacific Union Club most  
of the time?

A. He lived there for a while, but he was in Vic-  
toria the greatest portion of the time. He was east  
a good many times, also.

The WITNESS.—Oh, he was here for 2 or 3  
months or 6 months and then he would go away.

The WITNESS.—And he went to Europe for a  
year.

Mr. THORNE.—Q. Do you know what property  
Alexander Dunsmuir was interested in or had an in-  
terest in?

A. He was interested in the Wellington Collieries,  
the Esquimalt & Iron Railway, the Union Collieries  
of British Columbia and the R. Dunsmuir's Sons'  
Company of San Francisco, that is, so far as I know.

Q. And were there railways he was *interest* in?

A. Yes, the Esquimalt & Iron Railway.

Q. His interests in British Columbia were very

(Testimony of Walter A. Gompertz.)

large, were they not? A. Yes, sir.

Q. What was the nature of the business of R. Dunsmuir's & Sons' Company of San Francisco?

A. They were wholesalers of coal. They handled the products of the mines of the Wellington Colliery Company. [38]

Q. That is, so far as sales in San Francisco were concerned? A. Yes, sir.

Q. And this agency was merely a selling agency of the mines in British Columbia?

A. Of the product, yes, that is what you can call it, the selling agency. He had no ships, or anything like that.

The COURT.—Q. Selling and distributing—that is, you sold to the trade here? A. Yes, sir.

Mr. THORNE.—But all of his property was in British Columbia, was it not? A. Yes, sir.

(Witness Continued:) At all the times I have been speaking of James Dunsmuir resided in Victoria and resides there now. He is a British subject and is Premier and Lieutenant-Governor there. I have visited his home there. He lived with his mother and sisters in Victoria. When Alexander Dunsmuir went to Victoria I do not know where he stayed. I have heard that he stayed with his mother, but he never told me. Alexander Dunsmuir told me when he spoke of putting his name in the directory that he was a British subject and resided at Victoria, and that that was the way he wanted it in the directory. I visited Alexander Dunsmuir at the

(Testimony of Walter A. Gompertz.)

place where he dwelled in San Francisco.

Mr. THORNE (Counsel for Plaintiff):

Q. Did he have a home in San Francisco?

A. Well, no; it was places where he stopped at the Pacific Union Club, at the Grand Hotel and at the Occidental. When he was in San Francisco he stayed at clubs and hotels. I am familiar with the signature of Alexander Dunsmuir and can identify it.

(Witness being here shown Plaintiff's Exhibit No. 5, being page from register of the Hotel Imperial, continued:) [39] I find the signature of Alexander Dunsmuir on this paper. The following entry thereon is in his handwriting:

“Alex. Dunsmuir, wife & maid, Victoria, B. C.”

Counsel for plaintiff then offered in evidence the directories of the City and County of San Francisco for the years 1897, 1898 and 1899, for the purpose of showing the residence of Alexander Dunsmuir as Victoria, British Columbia. Said directories were admitted and read in evidence. Each of said directories contain the following entry: “Alexander Dunsmuir, President R. Dunsmuir's Sons Co., 340 Stuart Street, R. Victoria, B. C.” Upon request of counsel for defendant it was then admitted that the directories of the City and County of San Francisco for the years 1882 to 1891, inclusive, state the residence of Alexander Dunsmuir as being the “Pacific Union Club, San Francisco,” and that the directories for the years 1894 to 1895 state the residence of Alexander Dunsmuir as being the “Bohemian Club.”

(Testimony of Walter A. Gompertz.)

Upon request of counsel for plaintiff it was admitted that the directories of said City and County of San Francisco for the years 1892 and 1896 state the residence of Alexander Dunsmuir as being "Victoria, British Columbia."

On cross-examination the witness testified as follows:

About the years 1892, 1893, 1894 and 1895, Alexander Dunsmuir made the statements to me which I have spoken of, in regard to putting his name in the directories. He died January 31st, 1900. Besides living at the Pacific Union Club he lived at the Occidental Hotel and the Grand Hotel and in San Leandro.

Mr. PIER (Counsel for Defendant):

Q. About how much of the time each year would he spend home? I mean in Victoria. [40]

A. I could not say that he was always in Victoria when he was not here.

Q. How much of the time each year would he probably spend here?

A. Oh, I should say 4 or 5 or 6 months at a time. He was very fond of hunting and fishing, and used to go away on those trips up north a great deal. Sometimes he would only stay here for a week at a time. His mother died after he did. I think Mr. Dunsmuir had four rooms in the Grand Hotel. I would not be positive as to the number of rooms he had at the Occidental, but he had more than one. In regard to placing Mr. Dunsmuir's name in the directory, I don't remember now how many conversations

(Testimony of Walter A. Gompertz.)

I had with him. I can't remember whether I had more than one.

Mr. PIER. (Counsel for Defendant) :

Q. When did you first begin having charge of placing the names of the members of the company in the directory ?

A. I could not say exactly the years.

The COURT.—Q. Can you recall when you had the conversation that you say you had with Mr. Dunsmuir on the subject, what year that was ?

A. I should say that that was in 1896, at the time of the incorporation of the company, to the best of my recollection.

Mr. PIER.—Q. Will you relate the circumstances to the court under which you had this conversation with Mr. Dunsmuir in which he directed his residence be made Victoria, British Columbia ?

A. As I recollect it, it was at the time of the forming of the corporation in 1896, and that is the way he wanted his name put in the directory as President of the R. Dunsmuir Sons' Company. Now, the time and the place and the circumstances are not clear.

[41]

Q. What was his business before that time ?

A. The firm was under the name of R. Dunsmuir & Sons. His mother was the firm of R. Dunsmuir & Sons.

The COURT.—It was an unincorporated association ?

A. Unincorporated, yes, and Mr. Dunsmuir and his brother made arrangements with his mother

(Testimony of Walter A. Gompertz.)

whereby they incorporated the San Francisco business.

Q. The parent business was in Victoria, was it?

A. Yes.

Q. That was not incorporated? A. No.

Q. The ancestral residence was also in Victoria, was it? A. Yes.

Q. Was Mr. Dunsmuir born in Victoria?

A. No, I think not. I think he was born in Nainimo, on Vancouver Island.

Mr. PIER.—Q. Now, do you know how his name appeared in the directories before that time?

A. No, I do not know.

Q. Did you take any trouble to look up the directories prior to 1898? A. No, sir.

Q. Do you know that in the directory of 1886 that he gave his residence as Pacific-Union Club?

A. I do not know.

Q. And 1887 that he gave his residence as the Pacific-Union Club, and 1888 and 1889 and 1890 and 1891 and 1894, that his residence was given as the Bohemian Club, and 1895 as 340 Steiner Street?

A. I don't know that. I would like to say that I never saw the directories until this morning, when we looked at them to see his name in them.

Counsel for plaintiff offered in evidence an exemplified copy of the report and appraisal of the appraiser of collateral inheritance taxes in the matter of the estate of Alexander Dunsmuir, in the Superior Court of the State of California, in and for the



City and County of San Francisco, which reads as follows: [42]

**[Exhibit—Report and Appraisement of Appraiser  
of Collateral Inheritances.]**

*“In the Superior Court of the City and County of  
San Francisco, State of California.*

In the Matter of the Estate of ALEXANDER  
DUNSMUIR, Deceased.

No. 23,158—Department No. 10.

**REPORT AND APPRAISEMENT OF AP-  
PRaiser OF COLLATERAL INHERIT-  
ANCES.**

To the Honourable the Superior Court of the City  
and County of San Francisco, State of Califor-  
nia, Department No. 10.

I beg respectfully to submit the following report:

**1. ORDER APPOINTING APPRAISER.**

On the 25th day of June, 1900, your Honourable  
Court by its order duly made, entered and filed that  
day appointed the undersigned Appraiser to appraise  
all interests herein subject to Collateral Inheritance  
Tax, the said order directing said Appraiser ‘to  
make a report thereof in writing to the Court, to-  
gether with such other facts in relation thereof as  
said Court may by order require, and particularly  
any facts in relation to the said matter which may  
come to his knowledge and which may tend to assist  
the Court in determining what interests herein are  
subject to the said tax, and in assessing and fixing  
the market value of any interest in said estate sub-

ject to said tax,' and furthermore, 'to include in his said report a complete list of all interests in the said estate showing in the case of each whether it is in his opinion subject to Collateral Inheritance tax, with the reasons for his said opinion, and the facts and authorities upon which he bases such opinion.' (See exhibit F, annexed.)

## 2. OATH AND NOTICE.

My oath as such Appraiser is attached hereto and made a part hereof. See exhibit A, subjoined.

In conformity with the provisions of the Act establishing [43] the collateral inheritance tax, and pursuant to the order appointing me appraiser, I gave notice by mail to all interested parties of the time and place appointed for the appraisement. A copy of this notice showing to whom it was sent is attached hereto, marked exhibit B.

At the time mentioned in this notice the only persons appearing were Messrs. Wilson & Wilson attorneys for the executor and sole legatee.

By consent further proceedings were postponed until final distribution.

## 3. APPRAISEMENT OF PROPERTY.

The executor having filed his final account and petition for final distribution on the 23d day of May, 1901, proceedings in the matter of the collateral inheritance tax were thereupon resumed.

As shown by the inventory on file herein and by the final account of the executor, the property of the estate coming into the hands of the executor consists of money amounting to \$4,918.35 and 4,998 shares of

the capital stock of the Robert Dunsmuir's Sons Company, a corporation, organized and existing under the laws of the State of California.

To fix the value of these shares of stock, I have taken as a basis the statement of the assets and liabilities of the corporation furnished to me by the officers thereof.

The assets consist of moneys, credits (book accounts) and real estate situated in San Francisco. The liabilities consist of debts owing in the ordinary course of the corporation's business.

Upon personal inspection of the tangible property of the corporation and upon taking expert advice as to the value [44] of the real estate, and making due allowance for all debts and expenses of administration, as shown and provided for in the final account filed herein, I am of the opinion that the net marked value of all the property of this estate, including the moneys in the hands of the executor, should be fixed at the sum of Two hundred thousand (2000,000) dollars.

#### 4. THE WILL.

A copy of the last will and testament of the decedent is attached thereto marked exhibit C, and made a part hereof.

By this will the entire estate is given to James Dunsmuir, brother of testator.

Under the law in force at testator's death, the collateral inheritance tax is collectible on property passing to a brother of a testator.

See Statutes of 1899, Chap. LXXXV, page 101.

## 5. THE AGREEMENT WITH DECEDENT'S WIDOW.

Evidence has been submitted to me showing clearly enough that the testator left a widow surviving him, and that James Dunsmuir had entered into an agreement with her in recognition and settlement of her claims upon the estate by which he undertakes to pay her annually the sum of twenty-five thousand (\$25,000.00) dollars during the term of her natural life, beginning with the death of testator. This agreement I understand to be made in effectuation of the decedent's expressed wishes, as well as in composition of all claims which the widow might have made upon the estate of her deceased husband, whether by contesting the will, or by way of statutory claims for family allowance, homestead, etc.

It is now claimed on behalf of the brother, nominally the sole legatee under the will, that the provision thus made [45] for the widow should be regarded in the assessment of the collateral inheritance tax, and should be there treated in just the same manner as if it had been made by the testator himself, that is to say, the taxable value of the brother's interest in the estate is merely residuum left after deducting from the total distributive value of the estate the value of the widow's share, the latter being expressly exempted from taxation (Statutes 1899, *ubi supra*).

This contention has the support of authority.

Dos Passos, Inheritance Tax Law, secs. 43, 65,  
24 Am. & Eng. Law.

Re Pepper's Estate, 159 Pa. St. 509.

Re Kerr's Estate, 159 Pa. St. 512.

Page vs. Rives, 1 Hughes, Fed. Cas. 10,666.

The principal involved in these matters that it is proper for the Court in fixing taxes imposed upon these transfers of property by will or by succession to make taxation conform to actual conditions or beneficial enjoyment and to relieve the nominal beneficiary from the burden of the tax when it is satisfactorily shown that the real beneficiary is a person exempted by law from such taxation.

In the present instance I have examined witnesses under oath and received documentary evidence, from all of which it is established beyond doubt that the decedent, Alexander Dunsmuir, left him surviving a widow, Josephine Dunsmuir; that James Dunsmuir, the sole legatee under the will was instructed by testator shortly before his death to provide for her out of the estate and that James Dunsmuir, the said legatee, has accordingly entered into a written contract with Josephine Dunsmuir, the widow, whereby he undertakes to pay her the sum of [46] \$25,000.00 annually during the term of her natural life, in full satisfaction of all her claims in the premises and upon her husband's estate. Payments in full to date have been made regularly.

Under these circumstances I am compelled to report that for purposes of taxation, the otherwise taxable interest of James Dunsmuir in this estate is to be deemed subject to and burdened with an annuity in favour of testator's widow in the amount of \$25,000.00.

## 6. VALUE OF THE PROVISION MADE FOR DECEDENT'S WIDOW.

The Statutes (Statutes 1895, Chap. XXVIII, p. 33, sec. 11) provides a method for determining present values of annuities, and pursuant thereto I obtained an order (exhibit D subjoined) directing the Insurance Commissioner of the State of California to make the necessary computation of the value of an annuity of \$25,000.00 under the conditions as to age, etc., present in the case before us. The report of the Insurance Commissioner (exhibit E subjoined) shows the present cash value of the annuity in question to be \$314,075.00.

## 7. NO TAXABLE RESIDUUM.

As the value of the entire estate, shown above, is only \$200,000.00, it is at once seen that the burden placed upon the legatee's enjoyment of it by reason of the widow's claim is much in excess of its value, and that there consequently remains in the legatee no interest that is taxable.

## 8. RESIDENCE OF DECEDENT.

Mindful of the term of our statutes, and of various decisions, which uphold the taxation in the domicile of the decedent of personal property having actual *situs* outside of [47] this domicile, and being informed that Alexander Dunsmuir died possessed of personal property in British Columbia not included in the property here appraised, I conducted an enquiry into the facts affecting the question of his legal residence as a result of which I beg to report that Alexander Dunsmuir, deceased, was a British sub-

ject and a resident of British Columbia. No attempt is therefore made to apply the collateral inheritance tax to property left by him in foreign jurisdictions.

#### 9. NO TAXATION OF PROFITS ACCRUING SINCE TESTATOR'S DEATH.

The final account shows the receipt by the executor of certain moneys received by him as the net profits of the property of the estate, accruing subsequently to the death of the testator. This increment is not subject to taxation.

Dos Passos, *Inher. Tax. Law*, pp. 418, 419; 24 *Am. & Eng. Ency. Law*, p. 469.

*Re Vassar*, 127 N. Y. 1.

I have therefore not further considered it in making this appraisalment.

#### 10. IN CONCLUSION.

I beg to state that the facts here reported by me on the basis of which the Court is respectfully advised that no collateral inheritance tax is impossible in the matter of this estate, were elicited by examination of witnesses under oath administered by me as Court Commissioner and under my order of appointment as appraiser, which order following the statute directs me to report to the Court all pertinent facts affecting the taxation or exemption for taxation of all interests in this estate (see copy of order Exhibit F, annexed). [48]

The fair equivalent of five days has been actually and necessarily employed by me in this matter.

Respectfully submitted,

FINLAY COOK,

Appraiser.

Dated June 1st, 1901.

*In the Superior Court of the City and County of  
San Francisco, State of California.*

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER  
DUNSMUIR, Deceased.

No. 23,158. (Copy.)

OATH OF APPRAISER OF PROPERTY SUB-  
JECT TO COLLATERAL INHERITANCE  
TAX.

State of California,

City and County of San Francisco,—ss.

Finlay Cook, being duly sworn, deposes and says:  
That he is the duly appointed appraiser of property  
and interest in the said estate subject to collateral  
inheritance tax, and that he will, as such appraiser,  
truly, honestly and impartially appraise all such  
property and interests therein to the best of his  
knowledge and ability.

[Seal]

FINLAY COOK.

Subscribed and sworn to before me this 26th day  
of June, 1900.

N. E. W. SMITH,

Notary Public in and for the City and County of San  
Francisco, State of California.



EXHIBIT A.

To the State Controller, Sacramento, Cal., the District Attorney, San Francisco, Cal.; the City and County Treasurer, San Francisco; and Messrs. Wilson & Wilson, Attorneys for James Dunsmuir, Executor of and Sole Legatee Under the Last Will and Testament of Alexander Dunsmuir, Deceased, Mills Building [49] San Francisco, Cal.

*In the Superior Court of the City and County of San Francisco, State of California.*

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

Notice is hereby given that the undersigned has been duly appointed by the above-named court to appraise all interests in the above-named estate that are subject to collateral inheritance tax, and that he will make such appraisement on Monday, the 3d day of July, 1900, at 2 P. M., at his office, room 16, seventh floor, Mills Building, San Francisco, Cal.

FINLAY COOK,  
Appraiser. (Copy)

Dated June 25th, 1900.

EXHIBIT B.

I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made, and declare this to be my last will and testament.

I, give, devise and bequeath all my property, both real and personal wheresoever situate unto my brother James Dunsmuir of Victoria, Province of British Columbia absolutely and I appoint the said James Dunsmuir sole executor of this my will.

In testimony whereof I have hereunto set my hand this twenty-first day of December, one thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR.

Witnessed by

J. A. S. LOWE, Sausalito, Cal.

JAMES P. TAYLOR, Oakland, Cal.

[50]

EXHIBIT C.

*In the Superior Court of the City and County of San Francisco, State of California.*

DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158 (Copy).

APPLICATION TO INSURANCE COMMISSIONER TO DETERMINE VALUE OF CERTAIN INTERESTS SUBJECT TO COLLATERAL INHERITANCE TAX.

Finlay Cook, Appraiser of property of said estate subject to collateral inheritance tax, having reported to the Court that there is a certain annuity more particularly hereinafter described, the present value of which must be determining in fixing said tax:

Now, therefore, it is hereby ordered that the Insur-

ance Commissioner of the State of California be and he is hereby requested to determine the present value of an annuity of \$25,000.00 payable in equal monthly instalments to a person aged 49 years and 1 month at the commencement of said payments.

Said value shall be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies save that the rate of interest to be assessed in computing the present value thereof shall be five per centum per annum.

And said Commissioner is hereby directed to make report and return in accordance herewith to said Finlay Cook, appraiser as aforesaid.

Dated May 29th, 1901.

JAS. M. TROUTT,  
Judge of Superior Court. [51]

EXHIBIT D.

ANDREW J. CLUNIE,                      M. M. ROHRER,  
Commissioner.                              Deputy.

Office of

(Vignette) Insurance Commissioner.                      (Copy)

501 Clunie Building,

San Francisco, May 29th, 1901.

Finlay Cook, Esq., San Francisco:

Dear Sir,—In accordance with the order of Judge Jas. M. Troutt in the matter of the estate of Alexander Dunsmuir, deceased, directing me to give the

present value of an annuity of twenty-five thousand dollars, the age of the annuitant being 49 years, I hereby state amount to be three hundred and fourteen thousand and seventy-five dollars (\$314,075.00).

Yours respectfully,

[Seal of Ins. Com.] ANDREW J. CLUNIE,

Ins. Com.

By M. M. Rohrer,

Deputy.

### EXHIBIT E.

*In the Superior Court of the City and County of San Francisco, State of California.*

#### DEPARTMENT NO. 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

No. 23,158. (Copy.)

#### ORDER APPOINTING APPRAISER OF PROPERTY SUBJECT TO COLLATERAL INHERITANCE TAX.

It appearing to the Court that the values of certain interests in the estate of said deceased subject to the payment of collateral inheritance tax, are uncertain:

It is hereby ordered that Finlay Cook, Esq., a Court Commissioner of the city and county of San Francisco, State of California, a competent person, be and he is hereby appointed appraiser to appraise all interests herein subject to collateral inheritance tax, and to make a report thereof [52] in writing to the Court, together with such other facts in relation thereto as said Court may by order require, and par-

ticularly any facts in relation to the said matter which may come to his knowledge and which may tend to assist the Court in determining what interests herein are subject to the said tax, and in assessing and fixing the market value of any interest in said estate subject to said tax, said report to be filed with the clerk of said Court.

And it is further ordered that the said appraiser be and he is hereby required to include in his said report a complete list of all interests in the said estate, showing in the case of each whether it is, in his opinion, subject to collateral inheritance tax, with the reasons for his said opinion, and the facts and authorities upon which he bases such opinion.

And it is further ordered that the said appraiser be and he is hereby directed to give notice by mail forthwith of the time and place at which he will appraise said property to all persons known to have or claim an interest in any of the property of the said estate, as the same may appear from the papers on file herein, or may otherwise be made known to him; and to the Controller of the State of California, the Treasurer of the City and County of San Francisco, and the District Attorney of the City and County of San Francisco; said notice to be mailed at least five days before said day of appraisement.

JAS. M. TROUTT,

Judge of the Superior Court.

Dated June 25th, 1900. [53]

## EXHIBIT F.

## BRITISH CONSULATE GENERAL.

(Seal)

San Francisco,

TO ALL WHOM THESE PRESENTS SHALL  
COME:—

I, Wellesley Moore, Esquire, British Vice-Consul at San Francisco in the State of California, do hereby certify that Frank J. Murasky, whose signature is attached to the annexed certificate, is, and was at the date thereof, Presiding Judge of the Superior Court in and for the city and county of San Francisco in the State of California; and that Albert B. Mahony whose signature is attached to the annexed certificate is, and was at the date thereof county clerk of the city and county of San Francisco in the State of California and ex-officio clerk of the Superior Court thereof, and that the Seal attached thereto is the official seal of the said Superior Court and as such entitled to full credit.

In testimony whereof I have hereunto set my hand and seal of office in San Francisco the 11th day of August, 1903.

(Stamp)

WELLESLEY MOORE,

British Vice-Consul.

*In the Superior Court in and for the City and County  
of San Francisco, State of California.*

DEPARTMENT NO. 10—PROBATE.

In the Matter of the Estate of ALEXANDER  
DUNSMUIR, Deceased.

I, Albert B. Mahony, County Clerk of the City and

County of San Francisco and ex-officio clerk of the Superior Court of California, do hereby certify that I have compared the foregoing with the original thereof; and that I am the keeper of all said original, keeping same on file in my office as the legal custodian and keeper of the same under the laws of the [54] State of California, and I further certify that the foregoing copy attached thereto is a full, true and correct copy of the report and appraisement of collateral inheritance and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside but is still of full force and effect. All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court this 10th day of August, A. D. 1903.

(Seal)

ALBERT B. MAHONY,  
County Clerk.

I, Frank J. Murasky, Presiding Judge of the Superior Court, city and county of San Francisco, State of California, do hereby certify that said Court is a Court of record, having a clerk and seal, that Albert B. Mahony who has signed the annexed attestation, is the duly elected and qualified County Clerk of the city and county of San Francisco, and was at the time of signing said attestation, ex-officio Clerk of said Court. That said signature is his genuine handwriting and that all his official acts as such clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 10th day of August, A. D. 1903.

FRANK J. MURASKY,  
Presiding Judge of the Superior Court in and for  
the City and County of San Francisco, State of  
California.

State of California,  
City and County of San Francisco,—ss. [55]

I, Albert B. Mahony, County Clerk of the City and County of San Francisco, and ex-officio clerk of the Superior Court of the city and county of San Francisco, State of California, do hereby certify that the Honourable Frank J. Murasky, whose name is subscribed to the preceding certificate is Presiding Judge of said Court, duly elected and qualified, and that the signature of said Judge to said certificate is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court this 10th day of August A. D. 1903.

ALBERT B. MAHONY,  
County Clerk of the City and County of San Francisco, State of California and ex-officio Clerk of the Superior Court thereof.”

Upon such offer the following proceedings took place, viz.:

Mr. THORNE.—I would like at this point to offer the Report and Appraisement of the Appraiser of Collateral Inheritance Taxes, in the Matter of the Estate of Alexander Dunsmuir, for the Superior



Court of the City and County of San Francisco, State of California; the Order Appointing the Appraiser, and the Report of the Appraiser.

Mr. PIER.—We object to the admission of this Appraisement upon the ground that it is immaterial, irrelevant and incompetent what the Inheritance Tax Appraiser in the State proceedings may think about this agreement made between James Dunsmuir and Josephine Dunsmuir.

The COURT.—Does he express his thoughts in there about that?

Mr. PIER.—Yes; he goes into it and gives quite an extended [56] review of legal authorities.

The COURT.—And what is the claim for this?

Mr. THORNE.—That this is a judgment *in rem*, the proceedings taken in the Superior Court in and for the City and County of San Francisco, that it binds all the world; that this Collector of Internal Revenue was appointed by law, one of the purposes of his appointment being for this particular tax.

The COURT.—Was he appointed to assess this same tax you are suing for the recovery of?

Mr. THORNE.—He was appointed by the Government of the United States for the purpose of collecting this tax.

The COURT.—Who was?

Mr. THORNE.—The defendant in this case.

The COURT.—I thought that you were speaking of this Report? I say, what do you claim for this Report?

Mr. THORNE.—I was going on with my reasons; that this defendant is bound by this judgment *in rem*

for these reasons. It is a judgment *in rem*; assuming jurisdiction and proper notice, it binds the world, all the world. Everybody who had any claim or any interest in the property distributed is presumed to be before the Court. If he had any claim it was his duty to appear there. The Collector of Internal Revenue had the right to appear before Judge Troutt on the distribution proceedings and say that my tax depends upon whether or not Alexander Dunsmuir was domiciled in California; it depends also upon whether or not there is personal [57] property or real property, and how much real property. It also depends upon the amount of administration expenses—

The COURT.—I don't know anything about that. What has this report got to do with it? This was a report upon which the State Court acted?

Mr. THORNE.—Yes, sir.

The COURT.—You have put in the judgment of the Court?

Mr. THORNE.—This is one of the orders. It is a report by an officer of the Court—it is an administration; it is a judgment *in rem*, the same as a decree of distribution.

The COURT.—You mean this report is?

Mr. THORNE.—This report, as far as it goes, as regards the inheritance tax of the State.

The COURT.—No; that can in no way bind the Government in this proceeding to collect its independent tax.

Mr. THORNE.—It is evidence of these facts that are recited.

(Testimony of Peter W. Bellingall.)

The COURT.—The objection is sustained.

Mr. THORNE.—We note an exception.

**Exception No. 1.**

[**Testimony of Peter W. Bellingall, for Plaintiff.**]

PETER W. BELLINGALL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am a custom-house broker in San Francisco and have been such for thirty-seven years. I knew Alexander Dunsmuir in his lifetime and I knew him from the first time he came to San Francisco. The first time he came here on a visit. When he came down on business he came to supersede Mr. Berryman who had been the agent for the Wellington coal. Alexander Dunsmuir told me that he was a subject of British Columbia.

Mr. THORNE (Counsel for Plaintiff):

Q. Do you know anything about where Alexander Dunsmuir resided? [58]

A. Well, I know from my business in the custom-house that I frequently had to get someone to sign as sureties on bonds and he could not do it on account of his being a foreign citizen.

Q. Do you know of what country he was a subject?

A. I know that he told me he was a subject of British Columbia.

Q. Do you know of your own knowledge as to where he regarded his residence—what places he regarded as his residence?

A. I know from what he told me, and particularly in one case where he wanted to buy an American

(Testimony of Peter W. Bellingall.)

vessel and I told him at the time that on account of his own statement he was not eligible to own a vessel in America; that he might hold a mortgage on a vessel but not the ownership of one. At that time he wanted to buy the "Richard The Third," a sailing vessel, or rather, a half interest in her for Captain McIntyre. The money was turned over to McIntyre. He bought the vessel, that is, the half of it, and my office drew up a mortgage for the half from McIntyre to Dunsmuir. That is as near as my knowledge goes of his residence being in Victoria.

Q. Did the mortgage state that he was a resident of Victoria? A. How is that?

Q. How did that show that he was a resident of Victoria?

A. He stated it to me when he first talked about it. I asked him if he made his residence in San Francisco and he said no, his residence was with his father at that time. His father was alive at that time, according to my recollection.

Q. When was that?

A. I could not say except I went to the records of the custom-house and found out.

Q. Well, about when?

A. Well, I should say it was upwards of 20 years ago. [59]

On cross-examination the witness testified as follows:

I knew Alexander Dunsmuir for more than ten years. I knew him when he came down with his father as a boy. When Dunsmuir came down to

(Testimony of Peter W. Bellingall.)

supersede Berryman, he did not open up offices. The office went right along. It was not considered at that time to be the Dunsmuir Company. It was Berryman & Doyle, Berryman & Doyle being the agents for the Dunsmuirs. Doyle died, Berryman dropped out of the business entirely and the firm became Dunsmuir, Diggle & Co. Diggle was a partner in the firm and a lieutenant in the British Navy. In San Francisco Alexander Dunsmuir generally lived in hotels. It is my recollection that he was in the Occidental and I think he was in the Palace Hotel at one time. I do not consider that he lived in San Leandro. He had what we call a country place and which he bought for his wife. I do not think he stayed there much. I lived in Oakland and I think I met him on the boat only three or four times. I do not know that his wife lived at San Leandro. I did not go to the house. I knew where the place was. I was not familiar with the house.

Mr. PIER.—Q. The only time you ever had any occasion to consider the question of what country he was a subject, was at the time of buying this particular vessel?

A. No, I had frequently.

Q. (Intg.) That was on account of the bonds?

A. Yes, sir.

Q. But that was because he was a citizen of British Columbia?

A. They would not allow anybody to sign as sureties on the bond—I had to go and get Adolph Spreckels to sign bonds, and [60] I wanted him

(Testimony of Peter W. Bellingall.)

to return the compliment, and he said that he was not a resident and could not sign.

Q. That was because he was a citizen of British Columbia?

A. They would not take him because he was a British subject.

Q. And also at the time of buying the vessel, it was because he was a British subject that he could not buy the vessel? A. That was the reason.

Mr. THORNE.—I understood you also to say it was because he was not a resident of San Francisco?

A. That is the way I learned it from himself in talking about these matters.

The COURT.—The fact that a man is not a resident of San Francisco would be no objection to his buying a vessel of American bottom, but it is objectionable if he is a foreigner.

Mr. THORNE.—Did you visit Alexander Dunsmuir when he lived in the city, at his place of abode?

A. No, sir, I never did.

Counsel for plaintiff here offered in evidence agreement between James Dunsmuir and Josephine Dunsmuir, dated December 1st, 1900, which was admitted in evidence and marked Plaintiff's Exhibit No. 4. Said document reads as follows:

**[Plaintiff's Exhibit No. 4—Agreement Dated December 1, 1900, James Dunsmuir and Josephine Dunsmuir.]**

“THIS AGREEMENT, made and entered into this first day of December, A. D. 1900, by and between James Dunsmuir, of Victoria, B. C., brother

of Alexander Dunsmuir, deceased, the party of the first part, and Josephine Dunsmuir, of San Leandro, Alameda County, California, widow of the said Alexander Dunsmuir, deceased, the party of the second part.

WITNESSETH:

WHEREAS, said Alexander Dunsmuir departed this life in the city of New York, State of New York, on the 31st day [61] of January, 1900, leaving surviving him a widow, the said Josephine Dunsmuir, party of the second part hereto, but no children; and

WHEREAS, said Alexander Dunsmuir left a last will and testament dated December 21st, 1899, by which he devised and bequeathed all of his property both real and personal and wheresoever situate to his brother the said James Dunsmuir in form absolute, but in fact according to the previous understanding and agreement between the said James Dunsmuir and said Alexander Dunsmuir in his lifetime, partly in trust for the benefit of said Josephine Dunsmuir, widow, as aforesaid, and

WHEREAS, said Alexander Dunsmuir left property, both real and personal, situate both in the Province of British Columbia and in the State of California; and

WHEREAS, said last will and testament was admitted to probate in the Supreme Court of British Columbia on the 26th day of February, 1900, and all of the estate of the said deceased, both real and personal situated in British Columbia, was thereafter by decree of the said Court distributed to said James

Dunsmuir, pursuant to the terms of said last will and testament; and

WHEREAS, an authenticated copy of said last will and testament was thereafter, to wit, on the 9th day of May, 1900, admitted to probate in the Superior Court of the State of California, in and for the city and county of San Francisco in which jurisdiction a portion of the property belonging to said decedent is situate, which ancillary administration is still pending in said last named Court; and

WHEREAS, since the death of said Alexander Dunsmuir the [62] said James Dunsmuir, in accordance with said previous understanding and agreement between said James Dunsmuir and said Alexander Dunsmuir in his lifetime, has from time to time made suitable provisions for said Josephine Dúnsmuir, widow of the said brother as aforesaid; and

WHEREAS, in consideration of the premises, the parties hereto are mutually desirous of coming to an understanding and agreement concerning said trust hereinabove referred to;

NOW, THEREFORE, this agreement witnesseth, that said James Dunsmuir, in consideration of the premises, does hereby covenant, promise and agree to and with the said Josephine Dunsmuir to pay her, for and during the term of her natural life, the sum of Twenty-five thousand (25,000) Dollars per annum, in gold coin of the United States of America, payable in equal monthly installments, in the said city and county of San Francisco, commencing from the date of the death of said Alexander Dunsmuir; and



also and in addition thereto the full one-half of the net income arising from any and all property both real and personal, left by said Alexander Dunsmuir in the State of California which said James Dunsmuir shall or has received from the estate of said Alexander Dunsmuir, deceased, but only after the R. Dunsmuir's Sons Company, a corporation, shall have paid to R. Dunsmuir Company, a corporation under the laws of British Columbia the present existing indebtedness due from it to the latter corporation, all payments on account of such income to be made monthly; it being understood and agreed that the said annual payments of twenty-five thousand (25,000) dollars, and all payments on account of such income shall cease and determine upon the death of the said Josephine [63] Dunsmuir, widow, as aforesaid:

And in consideration of the said payments already made and to be made as hereinabove set forth, the said Josephine Dunsmuir, widow as aforesaid, does hereby expressly waive, relinquish and renounce, as heir at law and widow of Alexander Dunsmuir, deceased, for herself, her heirs, administrators and assigns, all right, claim and interest in and to any and all of the property left by the said Alexander Dunsmuir both real and personal and wheresoever situate, and in and to all family allowance arising either under the laws of the Province of British Columbia or under the laws of the State of California:

This agreement shall and is hereby declared to be binding and obligatory on the heirs, executors, ad-

(Testimony of William Greer Harrison.)

ministrators and assigns of both parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first herein above written.

In duplicate.

(Signed) JAMES DUNSMUIR. (Seal)

(Signed) JOSEPHINE DUNSMUIR. (Seal)

Witness:

RUSSELL J. WILSON.

M. S. WILSON.

Duly acknowledged before James Mason, Notary Public in and for the City and County of San Francisco, State of California, as to the signatures of both James Dunsmuir and Josephine Dunsmuir.”

**[Testimony of William Greer Harrison, for  
Plaintiff.]**

WILLIAM GREER HARRISON, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside in San Francisco and have resided there [64] about thirty-nine years. I knew Alexander Dunsmuir in his lifetime and I knew him for about twenty years. I became acquainted with him when he first came to San Francisco. He was representing here in San Francisco a coal firm, his people's firm. He was attending to the sales of coal here in San Francisco.

Mr. THORNE.—Did you ever have any conversation with Alexander Dunsmuir in reference to his residence?

A. Oh, yes, we frequently discussed that question.

(Testimony of William Greer Harrison.)

In conversation he always referred to British Columbia as his home.

Q. Had you any conversations in regard to that subject?

A. Quite frequently, because he was very fond of collecting stamps, and in a sort of semi-jocular way when he met me he would ask for stamps and that would lead to a discussion of Canadian vs. American method of Government, and so on. He rather seemed to take pleasure in insisting that his home was British Columbia.

Q. Did he ever state to you anything in regard to his being a British subject?     A. Oh, yes.

Q. What did he say in regard to that?

A. He was always a British subject, always as long as I knew him.

Q. What did he say in regard to that?

A. He considered that to be a British subject was something not to be lightly disposed of.

Q. Just state what he said in regard to that, as near as you can.

A. His expressions were general and sometimes specific. He would get into an argument with me as to the extreme value of British citizenship. I would take the American view and he would take the Canadian view. He was very enthusiastic [65] about Canada and about the methods of the government. I was equally enthusiastic—although then a British citizen myself—my views differed from his materially. He always wound up by saying he would not give up his citizenship, that he was a

(Testimony of William Greer Harrison.)

Canadian and would remain a Canadian; he was a British subject and would always remain a British subject.

Q. Can you tell when the last conversation with him was, when the subject of his home in British Columbia was discussed?

A. No, I could not fix that date; in fact, we had so many conversations on the subject that it would be rather confusing. But say a couple of years before he died he asked me to secure for him a package of English Revenue stamps. That led to a renewal of the conversation. That is as near as I can fix it.

Q. What did he say?

A. He said he was very anxious to have those stamps, that he could not get them here. And at that time I wrote to my head office—at that time I represented a large British corporation—and got the stamps for him. He expressed great pleasure in receiving them and congratulated himself on being a British subject.

Q. Did you ever visit him at the places where he dwelled in San Francisco, here?

A. No. My association with Dunsmuir was business and social. We belonged to several clubs and met in clubs.

Q. What clubs were they? Were they British clubs?

A. No, he belonged to the Pacific-Union Club, as I did; and he also belonged to the Olympic Club, as I did. I met him practically every day on

(Testimony of William Greer Harrison.)

“Change”; many of our discussions were at the Merchants’ Exchange.

Q. Did he belong to the British Benevolent Society? A. Yes. [66]

Q. Are you a member of that organization?

A. Yes, I am a life member.

On cross-examination the witness testified as follows:

I met Alexander Dunsmuir frequently at the Clubs and I came in contact with him at the Merchants’ Exchange on business matters.

Mr. PIER (Counsel for Defendant):

Q. These conversations you talked about were directed primarily at citizenship, were they not, the difference between British citizenship as compared with American citizenship? A. Yes.

Q. Did he ever talk about California as a home?

A. Oh, he was very fond of California.

Q. He liked to live here, did he not?

A. Oh, no; he always insisted that he was here because he had to be here to represent his firm in British Columbia.

**[Testimony of J. E. Freeman, for Plaintiff.]**

J. E. FREEMAN, called as a witness for plaintiff, after being duly sworn, testified as follows:

I am an architect and have resided in San Francisco since 1887. I knew Alexander Dunsmuir in his lifetime. I had business relations with him. I was an architect at that time. I was employed by Mr. Dunsmuir to build a residence for Mrs. Wallace

(Testimony of J. E. Freeman.)

at San Leandro. That was in 1899, in which year the residence was built. In the course of my relations with Alexander Dunsmuir I had a conversation with him relative to his residence. The conversation was brought up in this manner; speaking about the different nationalities becoming American citizens, I stated the conclusion that among my business acquaintance, a great many of them Englishmen, whilst they had business dealings in San Francisco and resided here they never became American citizens. That was about the conversation. During the course of that conversation [67] he stated that he was an Englishman and his residence was in Victoria. That conversation took place between the months of May and December, 1899, in the old house at San Leandro. The new house was built for Mrs. Wallace. All the contracts for that house were made in the name of Mrs. Wallace.

On cross-examination the witness testified as follows:

Mr. PIER (Counsel for Defendant):

Q. Did he speak about his residence being in Victoria or his citizenship being in Victoria?

A. His residence.

Q. Did he talk about his home?

A. His home was Victoria.

Q. What kind of a home did he have up there—did he say?

A. He spoke of his home in this manner: regarding the superintendence of the residence his father

(Testimony of J. E. Freeman.)

built some years previous to that, that he had complete charge of it.

A. That is where his father lived at that time?

A. Mother and father.

Q. Did you know where he lived in San Francisco?

A. Yes; I called on him when he was living at the Grand Hotel.

Q. Did you notice he was fixed up at the Grand Hotel, did he have more than one room there?

A. Yes.

Q. Several rooms?      A. Several.

Q. About how much time each year was he in San Francisco?

A. That I do not know. I can only speak of the time that I had business relations with him in the building of the house. He was living then in San Leandro, in the old house.

Q. Did he then say anything about liking San Leandro as a residence?      A. Not particularly; no.

The COURT.—Q. Mr. Freeman, who paid for the building of the house?

A. That was a point that was brought up, and I [68] asked him how I should make the certificates out and who would pay the bills. He said, "Make the certificates out in the name of Josephine Wallace," and that Dunsmuir & Sons, acting as her agents, would pay the bills.

Q. And they did?      A. And they did.

[**Testimony of J. Homer Fritch, for Plaintiff.**]

J. HOMER FRITCH, called as witness for plaintiff, after being duly sworn, testified as follows:

I reside in San Francisco and have resided here fifty-seven years. I knew Alexander Dunsmuir for about thirty years. I had a great many dealings with him.

Mr. THORNE (Counsel for Plaintiff):

Q. Did you ever have any conversation with Alexander Dunsmuir relative to his residence, his place of business?     A. Yes, sir.

Q. Just state what the conversation was.

A. Well, it extended over such a period of time; for instance, when we first came in contact with Mr. Alex. Dunsmuir—

Q. (Intg.) Who do you refer to?

A. My father and I. They used to visit our house a great deal.

Q. Who did?

A. The old gentleman—his father and mother. Alex. and sisters; in fact, one of the sisters, when she was sent here, my sister took her over and introduced her at Mills Seminary, where she went to school. I know the girls particularly. And there used to be a regular scrap about an American and an Englishman; an American could not compare to an Englishman, according to their ideas.

The COURT.—He is talking about Mr. Alex. Dunsmuir, not the family.

A. Mr. Alex. Dunsmuir, to a certain extent shared that feeling; he was British right to the word “go.”



(Testimony of J. Homer Fritch.)

He would frequently find fault about our American people, and everything of that kind. There is one instance I particularly [69] remember about his speaking of home; I think I gave that testimony once before. That was along about 1895 or 1896. I had been up to Victoria on a hunting trip with John Talbot. The following year Alex. Dunsmuir wanted me to join a party and go with him. When he came to me—I used to see him about every day when he was at the office. He says, “I am going up home on a hunting and fishing trip, I want you to go, you and Talbot; I said, “No; we was too well treated the last time we went up.” Always in conversation, in speaking of Victoria, he always called it his home. His home he claimed to be with his mother in what was known as the Dunsmuir Castle in Victoria. I met him also in Victoria on my way down from a hunting trip, and he says, “I want you to go out home and see mother and the family.” I said, “Mr. Dunsmuir, I cannot do it; father has telegraphed me and I have to go to-night.” Then I said, “Will you come down town with me to dinner?” and he said, “No, we will go to the club a little while and then I will let you go.”

Q. When was the last conversation you had with Alex. Dunsmuir in which he referred to Victoria as his home?

A. I think that was the last time, that I referred to. It was either 1895 or 1896.

Q. And he said that he was going up home?

A. Going home.

(Testimony of J. Homer Fritch.)

Q. To Victoria?     A. Yes.

On cross-examination the witness testified as follows:

I visited him at the Grand Hotel. I never visited him in San Leandro and I never went to his rooms except when it was a matter of business. He never referred to San [70] Leandro as his home or to his rooms as his home. It is pretty hard to say how much time he spent each year in San Francisco. His main business was in Victoria. He was interested with his brother there. Was an official in a number of companies there. His active interest was not here in San Francisco. San Francisco was an agency. One of the Robert Dunsmuir's Sons' Company had an office here. Part of his business was to look after the San Francisco agency. In the first place, Mr. Berryman had the agency for the Dunsmuir coal. That was along 1875 or 1876. Mr. Berryman got to speculating pretty heavily and got behind in his accounts. Alexander Dunsmuir was sent down here to investigate those accounts. In the course of about a year or so Berryman had to turn over the San Francisco business to the Dunsmuirs. Alex. came down and took charge of that. He put a Mr. Jewett, who was a nephew of Berryman's in charge of the business here. When Jewett died Mr. Lowe, who was a bookkeeper, was put in charge. So that Alexander Dunsmuir was never what you would call an active member of the business here. He was a kind of overseer. He kept

(Testimony of J. Homer Fritch.)

largely between the two points. He stayed here a great deal of the time.

On redirect examination the witness testified as follows:

I believe Alexander Dunsmuir was either president or vice-president of the Esquimalt Railway in Victoria. I would not be sure which. I think he was president. The main business was conducted at Victoria under the name of R. Dunsmuir's Sons. The agency was conducted under the name of R. Dunsmuir's Sons' Company, a California corporation. I visited Mr. Dunsmuir at his rooms here in San Francisco [71] occasionally. I should not consider that he had a home here in San Francisco, in the sense that he owned a home. When I visited him he was living at the Grand Hotel part of the time. Also I think he was rooming at the Occidental Hotel part of the time. I think it was about the year 1899 when he was married.

Mr. THORNE.—Q. Do you know whether he was in the habit of taking Mrs. Dunsmuir with him to British Columbia?

A. No, I never knew of him taking her up there.

Q. She lived over at Pleasanton?

A. San Leandro. They were living together for a matter of 20 years, I guess.

Q. Before they were married? A. Yes.

Q. She always lived down here?

A. Yes. He lived here—

Q. I say she always lived down there? A. Yes.

(Testimony of J. Homer Fritch.)

Q. You never knew of him taking her up there to British Columbia?

A. No, he never did. He always used to keep that fact in his pocket.

Q. He married her shortly before his death, did he not?

A. Yes, I think about two or three months. I think he married her more to satisfy his brother. His brother would not call on him or would not recognize her in any way and I think that is what brought about the wedding.

The COURT.—Q. And perhaps on her account as well?

A. Yes, I think possibly there was something in that, but I think it was James who was instrumental in bringing it about.

**[Testimony of Walter S. Thorne, for Plaintiff.]**

WALTER S. THORNE, called as a witness for plaintiff, after being duly sworn, testified as follows: Mr. THORNE (Counsel for Plaintiff):

Q. Dr. Thorne, what is your business?

A. Well, my name ought to indicate my business. I am a medical man. [72]

Q. The "doctor" is not a part of the name?

The COURT.—We know you in this community, Doctor, but it would not show on the record unless you stated it.

A. Oh, very well. I knew Alexander Dunsmuir in his lifetime. I knew him slightly for three or four years and intimately for two years just prior to his death. I have had conversations with Alexander

(Testimony of Walter S. Thorne.)

Dunsmuir respecting his residence in Victoria. The last incident of that sort that I recall was just prior to their removal to San Leandro, about a month prior to the completion of the house which was, I think, completed in December, 1899. I said, "Now, you are going to have a nice home over there; why don't you become an American citizen, behave yourself like an American, you are going to live here." He said, "You are quite mistaken; I am not going to live here, this is not my home, and this house is not intended to be my home. I am building this for Mrs. Wallace"—whom he had not married at that time. He said, "Under no consideration would I become an American citizen." Upon further investigation on questioning him I learned that he really had—well, you may call it a provincial or national prejudice against American citizenship. We talked along those lines. He was very positive about it. He said, "My home and my people and my interests are in Victoria, and I don't propose to live here or to become a citizen." I do not remember how many conversations I had with him respecting this subject. I remember this conversation because it was just before he moved over there. That conversation is very distinctly impressed upon my mind because of the coincident relation of that house building and my saying to him, "Well, now, you are going to live here; why don't you become an American [73] citizen," and his strenuous and positive denial of any such intention. I visited him a number of times in San Leandro and do not recall any conversation re-

(Testimony of Walter S. Thorne.)

specting this subject of residence when I visited him there. He lived in that new house that was built at San Leandro for a short time. He died, I think, at one of the Broadway Hotels in New York City, in January, 1900. I visited Alexander Dunsmuir in the city and county of San Francisco. He lived at the Grand Hotel. When I visited Mr. Dunsmuir at the Grand Hotel, Mrs. Wallace was always present.

**[Testimony of Thomas P. H. Whitelaw, for Plaintiff.]**

THOMAS P. H. WHITE LAW, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside at present in Piedmont. I previously resided in San Francisco for about forty-six years. I knew Alexander Dunsmuir in his lifetime. I have had business dealings with him. He was a citizen of British Columbia. He told me so. I have often been with him in Victoria, stopped with him at the Driard House in Victoria. He always kept his rooms there when he was in San Francisco. I have seen him a great many times in Victoria. The last time I saw him in Victoria was in 1887 or 1888. And I have visited him here at the Occidental Hotel. I have visited his mother's house up in Victoria. I have been to the Driard many times and had dinner with him. I visited him here at the Occidental Hotel. I never visited him at the Grand Hotel. We have had dinner at the Occidental Hotel. He had his rooms there when in San Francisco.

(Here it was admitted by counsel for defendant

(Testimony of Thomas P. H. Whitelaw.)

that Alexander Dunsmuir was at all times a British subject.)

On cross-examination the witness testified as follows: [74]

The Driard is a hotel in Victoria. Four times I went with Mr. Dunsmuir to what they call the Dunsmuir Castle, where his mother lived. He had rooms at the Driard House in Victoria, and also at his mother's house, upstairs in the upper part of the building. He had two rooms at the Driard House. He had two rooms at the Occidental Hotel. I don't think he kept the rooms here in San Francisco when he went to Victoria, but he always kept the rooms at the Driard. He told me that himself. That was in 1887. I was in Victoria working on some wrecks, and I used to see him very often. I was up there sometimes for three or four months. He spent more than three or four months of the year up in Victoria. He did not spend the greater part of each year in San Francisco. The greater part of his time was spent in British Columbia. I do not think he went hunting much; once in a while, possible.

**[Testimony of W. E. Mighell, for Plaintiff.]**

W. E. MIGHELL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I knew Alexander Dunsmuir intimately in his lifetime. I was partner with him in ships. I have had business relations with him. I had a conversation with him in regard to where his residence or home was. The conversation opened about his buy-

(Testimony of W. E. Mighell.)

ing some stock in the California Shipping which I started and it drifted on to his residence, and I asked him why he had not become naturalized. He said that there was nothing in it, that his residence was in British Columbia, all his interests were there, that he owned an interest in the Wellington Collieries, the Esquimalt Railway, and was interested in Victoria and on the Island of Vancouver. He said he represented the firm of R. Dunsmuir & Sons here in San Francisco. The last conversation I had with him in relation to his residence was the afternoon before he was [75] married. We were on the Oakland Ferry, going from San Francisco to Oakland, and, if I remember right, there was an American ship flying an American ensign that we passed as we went over. I said, "Alex., that is the flag you ought to live under," and he said, "Oh, no; the flag I am under suits me, the English flag." "Well," I said, "Why don't you become naturalized, become an American? Your business is here." "Well," he says, "Bill, there is nothing to it; I would prefer to remain under the English flag, where all my interests are." At that time, he also mentioned that his residence was Victoria, British Columbia. I knew he lived there. I have visited him at his office there and have seen his brother there and his family.

On cross-examination the witness testified as follows:

Mr. Dunsmuir did not take stock in this California Shipping Company. He gave me as a reason for not doing so that he did not care to have anything that



(Testimony of W. E. Mighell.)

was under the American flag.

Mr. PIER (Counsel for Defendant):

Q. What was his idea on that?

A. Well, that he wanted to remain English, I suppose.

The COURT.—Q. Were you aware that he subsequently did see fit to incorporate his company under the American law?

A. That I know nothing about at all. I knew his father when he lived here.

(Witness continuing:) The conversation in regard to his buying stock in the California Shipping Company, which I have already mentioned, took place about November, 1899.

The COURT.—Q. At that time he told you he did not want anything under the laws of the United States? [76]

A. He claimed he wanted to be English.

The COURT.—Q. Did he own any stock in the R. Dunsmuir & Company? A. That I don't know.

The COURT.—I am asking counsel that.

Mr. THORNE.—Yes, he owned after that.

The COURT.—Q. How did you understand him to state to you that he did not want anything under the laws of the United States?

A. I did not think at all about it; I never asked him.

Q. I am asking you what would you say now as to such a statement to you in view of the fact that he was then half owner in a very large corporation?

A. What would I think about it?

(Testimony of W. E. Mighell.)

Q. Yes.      A. I think it would not agree.

Q. Does it at all shake your recollection as to what he actually said to you?      A. No.

**[Testimony of William E. Mitchell, for Plaintiff.]**

WILLIAM E. MITCHELL, called as a witness for plaintiff, after being duly sworn, testified as follows:

I was employed as a clerk in the Bank of British Columbia during the years 1883 to 1900, inclusive. I had occasion to come across the signature of Alexander Dunsmuir in the course of my employment. I am familiar with his signature. During the years 1894 to 1900, inclusive, I was a ledger-keeper in the bank, and in that capacity I would come across the signature of Alexander Dunsmuir. I can't say I ever saw him write his signature. I know those were his signatures, because in the course of business, we see signatures and recognize them as being the signatures of the parties to whom they are credited. We also had specimen signatures which we went by, facsimilies. I saw in the ordinary course [77] of business what would purport to be the genuine signature of Alexander Dunsmuir. I may have paid out money on his signature. I don't remember whether or not I did. During the years I have been in the bank I have been in different positions. (Witness being shown Plaintiff's Exhibit No. 5, which is a page from the register of the Hotel Imperial, continued:) I see the signature of Alexander Dunsmuir on that paper. I mean not merely that I see the name "Alexander Dunsmuir," but I see what, in my judgment, is his genuine signature. The following

(Testimony of William E. Mitchell.)

entry on that paper is in the handwriting of Alexander Dunsmuir, viz.: "Alex. Dunsmuir, wife & maid, Victoria, B. C."

On cross-examination, the witness testified as follows:

I have met Alexander Dunsmuir, casually. I might have talked to him, but I don't remember of having done so. All I can say about this signature is that it is the signature upon which I acted in the regular course of business in entering up checks in the ledger.

**[Testimony of George Russell Reed, for Plaintiff.]**

GEORGE RUSSELL REED, called as a witness for plaintiff, after being duly sworn, testified as follows:

I reside in Berkeley and am engaged in business in San Francisco. I have been engaged in business in San Francisco for about twenty-five years. I take periodical trips to New York. I was in the city of New York on December 26th, 1899. I stayed at the Hotel Imperial and I registered at that hotel on that day. (Witness being handed Plaintiff's Exhibit No. 5, which is a page from the register of the Hotel Imperial, continued as follows:) I find my signature on that paper. That paper contains the following entry: "Geo. R. [78] Reed, S. F." "Geo. R. Reed" is under the column headed "name" and under the column headed residence, is "S. F." in my handwriting. This paper (referring to Plaintiff's Exhibit No. 5) is all to appearances and to my best belief the page from the register of the Hotel Imperial that I

(Testimony of George Russell Reed.)

signed on that day, but I cannot, under the circumstances, positively swear that I know it is. I have no doubt whatever that it is so.

Counsel for plaintiff offered in evidence page from the register of the Hotel Imperial, which was admitted in evidence and marked Plaintiff's Exhibit No. 5. Said paper reads as follows:

**[Plaintiff's Exhibit No. 5—Register Entries of Hotel Imperial December 25, 1899, etc.]**

“HOTEL IMPERIAL.

Robert Stafford.

Monday. New York, Dec. 25, 1899.

Money, Jewels, and other valuable Packages must be placed in the Safe in the Office, otherwise the Proprietors will not be responsible for any loss.

| Name. | Residence. | Room. |
|-------|------------|-------|
|-------|------------|-------|

Continued.

|                   |       |     |
|-------------------|-------|-----|
| Mrs. Laura Barker | City  | 169 |
| Miss McDonald     | “     | 169 |
| John D. Shibe     | Phila | 234 |

Tuesday, Dec. 26th, 1899.

|                       |                     |     |
|-----------------------|---------------------|-----|
| W. R. Bowman & wife   | Phila., Pa.         | 190 |
| Geo. R. Reed          | S. F.               | 234 |
| Wm. Chaflin           | St. Catherine, Ont. | 354 |
| Jno. W. Parker        | Havana, Cuba        | 170 |
| J. A. Northrop        | Johnstown, N. Y.    | 254 |
| Scott H. Hayes        | Cleveland, O.       | 91  |
| Randolph Tobias       | Charleston, SC      | 124 |
| Harry Nonnent         | Wash D. CC          | 234 |
| Francis J. Washington | Balto. Md.          | 104 |

*Joseph J. Scott.* 101

|                      |                |     |
|----------------------|----------------|-----|
| Wm. J. Crawford, Jr. | Philada        | 78  |
| J. I. Sweet          | Jewett City Ct | 286 |
| Miss Stoddard        | Phila          | 434 |
| G. W. Stalker        | Chicago        | 295 |

[79].

### HOTEL IMPERIAL.

Robert Stafford.

Continued: New York, 12/26, 1899.

Money, Jewels, and other valuable Packages must be placed in the Safe in the Office otherwise the Proprietors will not be responsible for any loss.

| Name.                          | Residence.       | Room.      |
|--------------------------------|------------------|------------|
| E. P. Bennett and wife         | New Haven Ct     | 141        |
| F. E. Ables                    | Milwaukee        | 133        |
| Hansen Smith                   | Duluth           | 338        |
| F. W. Kavanaugh                | Waterford, N. Y. | 412        |
| Mrs. H. S. Platt, Jr.          | St. Louis, Mo.   | 340        |
| Miss Annie Johnson             | St. Louis, Mo.   | 340        |
| W. P. Armitage                 | Troy N. Y.       | 304        |
| Thomas Gresham                 | Chester S. C.    | 393        |
| J. M. Jamison                  | Hamlet, N. C.    | 393        |
| W. E. Seabrook                 | “ “              | 393        |
| Alex. Dunsmuir, wife &<br>maid |                  | 490<br>491 |
| Victoria, B. C.                |                  | 492<br>493 |
| C. S. Middleton & wife         | San Francisco    | 187        |
| J. H. Zerbez & wife            | Pottsville, Pa.  | 389        |
| Wm. Bailey                     | Williamsport, Pa | 82         |
| Richard Bartholdt              | St. Louis Mo.    | 431        |
| John Philip Sousa, Jr.         | N. Y.            | 404        |

(Testimony of George Russell Reed.)

|                 |        |    |
|-----------------|--------|----|
| W. H. Stratton  | Conn   | 86 |
| W. F. Finlayson | Boston | 65 |
| Jas. Bell       | “      | 67 |
| F. J. Graham    | “      | 69 |

On cross-examination the witness testified as follows:

I know in this way that I actually wrote my name on the register of the Hotel Imperial on the 26th day of December, 1899. I know I went to New York, was in New York at that time, registered at no other hotel and would swear that that is my signature. Independently of this paper (referring to Plaintiff's Exhibit No. 5), I would be able to state that I had registered at that hotel on December 26th, 1899, after taking the time to look up my business records in New York at that time, of which there are business entries [80] connected with the house with *him* I was doing business. I have not looked up those business records as it would take some time to do so as it has been twelve years. I have an independent recollection at this time of the circumstances concerning the signing of my name to this paper, in this respect, that as I remember it Mr. Bate, the Secretary of the Edward H. Levy Company of New York, was to meet me to go to the club on that day, and I could not have met him and gone on that day had I not registered at the Hotel Imperial on that day, because he was to meet me at the Hotel Imperial. That was the day I arrived in New York, and I had my engagement with Mr. Bate on that day.

**Defendant's Case.**

Mr. PIER.—I want at this time to introduce in evidence a certified copy, certified by the Secretary of State, of the Articles of Incorporation of the R. Dunsmuir's Sons & Company, which gives the residence of Alexander Dunsmuir, at San Francisco, California. The Code specifically provides that each of the incorporators shall give his name and residence. This was done in the regular course of business.

The COURT.—Is it sworn to?

Mr. PIER.—The Articles of Incorporation were acknowledged before James Mason.

Mr. THORNE.—We object to the introduction of this document in evidence upon the ground that it is immaterial, irrelevant and incompetent, and further that it is an attempt to impeach the judgment of a court of competent jurisdiction, namely, the Superior Court of the State of California, in and for the City and County of San Francisco, adjudged that Alexander Dunsmuir was a resident domiciled in Victoria at the time of his death, and that being a judgment *in rem* this amounts to a collateral attack upon that judgment. [81]

The COURT.—The objection is overruled.

Mr. THORNE.—We take an exception.

**Exception No. 2.**

The document was admitted in evidence, marked Defendant's Exhibit "A," and reads as follows:

**Defendant's Exhibit "A"—Articles of Incorporation of R. Dunsmuir's Sons Co.]**

**"ARTICLES OF INCORPORATION**

of the

R. Dunsmuir's Sons' Company.

Know all men by these Presents, that we, whose names are hereunto subscribed, have this day voluntarily associated ourselves for the purpose of forming, and do together form a corporation, under the laws of the State of California.

And we hereby certify,

FIRST: The name of the incorporation is

R. DUNSMUIR'S SONS COMPANY.

SECOND: The purposes for which it is formed are, to acquire, own, hold, improve, lease and dispose of lands, and interests in lands; to acquire, build, construct, own, hold, manage and use wharves, docks, basins, drydocks, piers and warehouses, or any interest in the same; to borrow and loan money; to engage in, and carry on the business of commerce, foreign and domestic; to build, equip, furnish, or buy and sell, or charter ships and vessels, and navigate the same; to purchase, take hold, and use shares of the capital stock of other corporations, or membership therein; to purchase, acquire and use personal property of every name and description; to act as



agents for other persons or corporations in the transaction of business; to locate, acquire, hold, develop and operate mines of precious or valuable ores, metals, and other substances, and deal in and with the products of mines of every kind or nature; [82] to sell, convey, grant, mortgage, hypothecate or otherwise dispose of property, real or personal, and generally, to do and transact any business for which individuals may lawfully associate themselves, and which are not prohibited by the laws of the State of California.

THIRD: The place where its principal business is to be transacted is the City and County of San Francisco in the State of California.

FOURTH: The terms for which it is to exist is fifty years.

FIFTH: The number of its Directors is five, and the names and residences of those who are appointed for the first year, are

| Name.                     | Residence.                  |
|---------------------------|-----------------------------|
| Alexander Dunsmuir        | San Francisco, California.  |
| James Dunsmuir            | Victoria, British Columbia. |
| James T. Boyd             | San Francisco, California.  |
| Cavalier Hamilton Jouett  | San Francisco, California.  |
| Walter Alexander Gompertz | Berkeley, California.       |

SIXTH: The amount of its capital stock is One Million Dollars, divided into ten thousand shares, of the par value of one hundred dollars each.

SEVENTH: The amount of said Capital Stock which has been actually subscribed is one million dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

| Names of Subscribers.     | No. of Shares. | Amount.   |
|---------------------------|----------------|-----------|
| Alexander Dunsmuir        | 4,998          | \$499,800 |
| James Dunsmuir            | 4,988          | 499,800   |
| James T. Boyd             | 2              | 200       |
| Cavalier H. Jouett        | 1              | 100       |
| Walter Alexander Gompertz | 1              | 100       |

[83]

In Witness Whereof, we have hereunto set our hands and seals, this Twenty-seventh day of February, A. D. 1896.

JAMES DUNSMUIR. (Seal)

ALEXANDER DUNSMUIR. (Seal)

JAMES T. BOYD. (Seal)

CAVALIER HAMILTON JOUETT (Seal)

WALTER ALEXANDER GOMPERTZ. (Seal)

Signed and sealed by James Dunsmuir in the presence of

CHAS. E. POOLEY.

By ALEXANDER DUNSMUIR,

JAMES T. BOYD,

CAVALIER HAMILTON JOUETT and

WALTER ALEXANDER GOMPERTZ,

JAMES MASON.

State of California,

City and County of San Francisco,—ss.

On this seventh day of March, in the year one thousand eight hundred and ninety-six, before me, James Mason, a Notary Public, in and for the said City and County, duly commissioned and sworn, personally appeared, Alexander Dunsmuir, James T. Boyd, Cavalier Hamilton Jouett and Walter Alexander Gompertz, known to me to be the persons described

in whose names are subscribed to and who executed the within and annexed instrument and they duly acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of  
San Francisco, State of California.

United States Consulate,  
British Columbia.

Victoria, B. C. Feb'y 27th, 1896.

I, M. R. Eure, Vice-Consul of the United States, at Victoria, B. C., do hereby certify that on this 27th day of February, 1896, James Dunsmuir, who is known to me to be [84] the same individual who executed the annexed written instrument, personally appeared before me and acknowledged that he had signed and sealed said instrument freely and voluntarily for the purpose and consideration therein stated.

In witness whereof, I have hereunto set my hand, and affixed the seal of the Consulate, at Victoria, B. C., this day and year next [Seal] above written, and of the independence of the United States the one hundred and twentieth.

M. R. EURE,

Vice-Consul of the United States.

State of California,

City and County of San Francisco,—ss.

I, C. F. Curry, County Clerk of the City and

County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the original Articles of Incorporation of the R. Dunsmuir's Sons' Company filed in my office on the 9th day of March, A. D. 1896.

ATTEST my hand and my official seal, this 9th day of March, A. D. 1896.

[Seal]

C. F. CURRY,  
County Clerk.

By Wm. R. A. Johnson,  
Deputy County Clerk.

[Endorsed]: Filed in the Office of the County Clerk of the City and County of San Francisco, State of California, this 9th day of March, A. D. 1896. C. F. Curry, County Clerk. By Wm. R. A. Johnson, Deputy Clerk.

[Endorsed]: Filed in the office of the Secretary of State the 10th day of March, A. D. 1896. L. H. Brown, Secretary of State. By W. T. Sesnon, Deputy. [85]

Record Book 87, page 317.

No. 20175.

Frank C. Jordan,  
Secretary of State,

Frank H. Cory,  
Deputy.

STATE OF CALIFORNIA,  
Department of State.

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of R. Dunsmuir's Sons Company with the certified copy of the original now on file in my

office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 4th day of January, A. D. 1912.

[Seal]

FRANK C. JORDAN,  
Secretary of State.  
By Frank H. Cory,  
Deputy."

Mr. PIER.—I wish to introduce a certified copy of the Will of Alexander Dunsmuir. This is a certified copy of the authenticated copy of the last will and testament of Alexander Dunsmuir, restored by order of Court on the 4th day of January, 1912. That is the record in the Superior Court, where the will was probated, where probate was made upon the estate of Alexander Dunsmuir here upon an authenticated copy of the will. I have here a certified copy of that restored will. I wish to introduce that in evidence. In this will Alexander Dunsmuir refers to him as of San Francisco, California. [86]

Mr. THORNE.—We object to it upon the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach a judgment *in rem*, a conclusive judgment; it amounts to a collateral attack upon the judgment. On the further ground that the terms of the will were merged in the decree. The question of domicile cannot be proven in this way. No evidence can be introduced by means of this will to impeach the decree admitting this will to probate, and

also the decree of distribution, because the will and the terms of the will are all merged in the decree of distribution. I have a number of cases on that point your Honor.

The COURT.—Yes, that would be all right if the judgment was conclusive, but I hold that the judgment in probate is not conclusive on this Court at all on the question of residence.

Mr. THORNE.—We take an exception.

### **Exception No. 3.**

The document was admitted in evidence, marked Defendant's Exhibit "B" and reads as follows:

#### **[Defendant's Exhibit "B"—Will of Alexander Dunsmuir.]**

"I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made and declare this to be my last will and testament. I give, devise and bequeath all my property, both real and personal, wheresoever situate, unto my brother, James Dunsmuir, of Victoria, Province of British Columbia, absolutely, and I appoint the said James Dunsmuir sole executor of this my will. In testimony whereof I have hereunto set my hand this twenty-first day of December, one thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR. [87]

Signed by the Testator as and for his last will and testament in the presence of us, who at his request, in his presence, and in the presence of each other,

have hereunto subscribed our names as witnesses.

JAS. LOWE, Sausalito, Cal.

JAMES P. TAYLOR, Oakland, Cal.

Endorsed: filed Jan 4, 1912. H. I. Mulcrevy, Clerk.  
By E. B. Gilson, Deputy Clerk.

Office of the County Clerk of the City and County of  
San Francisco.

I, H. I. Mulcrevy, County Clerk of the City and  
County of San Francisco, and ex-officio Clerk of the  
Superior Court thereof, do hereby certify the fore-  
going to be a full, true and correct copy of the au-  
thenticated copy of the last will and testament of  
Alexander Dunsmuir, restored by order of Court on  
the 4th day of January, A. D. 1912, in the matter of  
the Estate of Alexander Dunsmuir, deceased, now on  
file and of record in my office.

Witness my hand and the seal of said court this  
9th day of January, A. D. 1912.

[Seal]

H. I. MULCREVY,  
County Clerk.

By H. G. Benedict,  
Deputy County Clerk.”

Mr. PIER.—I want to introduce in evidence a cer-  
tified copy of the marriage license of Alexander  
Dunsmuir and Josephine Wallace, in which he de-  
scribes himself as a resident of Alameda County,  
California. This is a certified copy from the  
County Recorder of the County of Contra Costa,  
where the marriage license was issued. [88]

Mr. THORNE.—This is objected to upon the  
ground that it is immaterial, and irrelevant and is an  
attempt to impeach collaterally the judgment of the

Superior Court of the City and County of San Francisco, State of California, namely, the decree of distribution in the Estate of Alexander Dunsmuir, Deceased, wherein the domicile of the decedent in that proceeding is determined as being in British Columbia and furthermore, upon the ground that this marriage license is not evidence of any fact concerning residence for the reason that it is not sworn to or signed by Alexander Dunsmuir, and it does not appear that any authority was given by Alexander Dunsmuir to sign the same.

Mr. PIER.—I will establish that by another witness; that is, the authority.

The COURT.—What do you mean, you will establish what?

Mr. PIER.—Counsel says there is no evidence of any authority being given.

The COURT.—The law requires first certain things to be stated in applying for a marriage license; among other things, residence. That is the act of a public officer, and a public officer is presumed to do his duty, and to write the fact in accordance with the fact as it is presented to him. The objection is overruled.

Mr. THORNE.—We take an exception.

**Exception No. 4.**



The document was admitted in evidence, marked Defendant's Exhibit "C" and reads as follows:

[Defendant's Exhibit "C"—Marriage License of Alexander Dunsmuir and Josephine Wallace.]

"MARRIAGE LICENSE.

State of California, County of Contra Costa.

THESE PRESENTS are to authorize and license any [89] Justice of the Supreme Court, Judge of the Superior Court, Justice of the Peace, Priest or Minister of the Gospel of any denomination, to solemnize within said county the marriage of Alexander Dunsmuir, native of British Columbia, aged 46 years, a resident of Alameda County, California, and Josephine Wallace, native of New York, aged 38 years, a resident of Alameda Co. California, they being of sufficient age to contract marriage.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Superior Court of said County, this 19th day of December, A. D. 1899.

J. E. RODGERS,  
County Clerk.

By \_\_\_\_\_,  
Deputy Clerk.

State of California,  
County of Contra Costa.

This Certifies, That I, Wm. C. Shaw, a Clergyman of the County of Contra Costa, united in Marriage, at San Pablo in the County of Contra Costa on this twenty-first day of December, A. D. 1899, Alexander

Dunsmuir, native of British Columbia, aged 46 years, residing at San Leandro, California, and Josephine Wallace, native of New York, aged 38 years, residing at San Leandro, California; as authorized by the within license and in accordance with the laws of the State of California.

W. C. SHAW,

(Official character) Clergyman.

(10c revenue stamp)

A. E. D.

Jan'y 22, 1900.

Witnesses:

JAMES P. TAYLOR,

Residing at Oakland, California.

JAS. LOWE,

Residing at Sausalito, California.

Recorded at request of J. P. Taylor this 22d day of January, A. D. 1900, at 35 minutes past 1 P. M.

A. E. DUNKEL,

County Recorder.

State of California,

County of Contra Costa,—ss. [90]

I, M. H. Hurley, County Recorder in and for said County and State, do hereby certify that the hereto attached and foregoing paper is a full, true and correct copy of the Record of an Instrument as the same appears in Volume 5 Marriage Certificates, page 399, Records of said County, now in my custody.

(Testimony of Joseph Herrscher.)

Witness my hand and official seal, at Martinez, this 15th day of November, 1909.

[Seal]

M. H. HURLEY,

County Recorder in and for Contra Costa County,  
State of California.”

**[Testimony of Joseph Herrscher, for Defendant.]**

JOSEPH HERRSCHER, called as a witness for defendant, after being duly sworn, testified as follows:

I am in the general merchandise business in San Francisco and San Leandro. I knew Alexander Dunsmuir in his lifetime. I have talked with him about California at various times. He told me he was going to make his home in California; that he made his home there. He never dwelt upon San Francisco, only San Leandro. I recollect various conversations I had with him. I was City Treasurer at that time and also a member of the Board of Education and he took quite a liking to me in talking matters over, and in delivering meats. He was a very peculiar man; he did not want everybody going in his premises and any orders given at the store at that time he wanted me to deliver them personally. At that time he spoke of making his home in California and liking the country here.

On cross-examination the witness testified as follows:

He never told me where he had resided prior to [91] going to San Leandro. He never went into any details about his whereabouts. He only conversed in reference to the climate and the country

(Testimony of Joseph Herrscher.)

and the surroundings. He did not tell me he intended to make his home in San Leandro. He said he had made his home there, he was going to stay there, and that he liked it. I don't know that this property belonged to Mrs. Wallace; he always mentioned it as his. I do know that she had an interest in it. I do not know the details of the estate at all. I am just explaining to you what Mr. Dunsmuir told me himself. I did not know that this was not his home in the sense that it did not belong to him. He never told me anything about that. I do not know when Mr. Dunsmuir was married, but it must have been in 1889. I could not say whether he told me this before or after he was married. I know the lady was living up there; I had conversations with her and she gave me orders. I called her Mrs. Dunsmuir. I cannot tell exactly the date or month when I first called her Mrs. Dunsmuir, but I know it was in 1889. I do not remember when they were married. I think they bought the place up there in 1889. I mean 1899,—I made a mistake in the year. I don't think the house was completed during the time I saw him; I think it was in course of construction. I think he did live in that large house. I went there myself with the wagon. That was not after his death. I was there after he died, but I recollect the time he was living in the house. I cannot say whether or not he was living in the old house when the place was bought for Mrs. Wallace. I saw him in the new house several times. The first time I met him I drove up to the place to get orders and I [92] met

(Testimony of Joseph Herrscher.)

him at the gate. I asked him if he was Mr. Dunsmuir and he said yes. Then we talked over matters and got acquainted. He told me this was the only country he liked. He did not say he was going to make his home there. But he said, "I have bought this place and this is my home." I don't know what brought out that conversation. I have no interest in this matter at all. I am here telling just what the man told me. I went up there once or twice a week for orders for groceries and general merchandise. He was not very pleasant when I approached him first, but when we got acquainted and he knew my standing in the community we were friends. I do not remember when Alexander Dunsmuir was married. I knew, however, that he was married. He told me to see his wife about the orders. He told me that in 1899, about six or seven months before he died. I remember seeing an account of the marriage in the papers.

**[Testimony of Jerome F. Trivett, for Defendant.]**

JEROME F. TRIVETT, called as a witness for defendant, after being duly sworn, testified as follows:

I am the rector or priest in charge of the Church of the Advent in Oakland. The priest in charge before me was Rev. Wm. Carson Shaw. (Witness being shown a register of marriages, continued:) That is the register that has been kept in my church of the marriages performed there by Mr. Shaw prior to my having charge of the Church. I being an official in charge of the Church have the official custody

(Testimony of Jerome F. Trivett.)

of this record. As demanded by our laws, this record is the regular record kept by the priest in charge of my Church and this book is kept in pursuance of the regulations of the Church. The record shows a record of marriage of Alexander Dunsmuir and Josephine Wallace on Thursday, December 21st, 1899, at page 108, Volume 2 of the parish records. [93]

Counsel for defendant thereupon offered said record in evidence as to the marriage of Alexander Dunsmuir and Josephine Wallace. Counsel for plaintiff objected to the introduction of the same as immaterial, irrelevant and incompetent and an attempt to impeach the decree of the Superior Court of the State of California, in and for the City and County of San Francisco, on account of jurisdiction, wherein it is decreed that the domicile of the decedent was in British Columbia, and upon the further ground that the attempt to introduce this evidence amounts to a collateral attack upon that judgment. The objection was overruled and an exception taken.

#### **Exception No. 5.**

The following entry in said register of marriages was then read in evidence:

**[Exhibit—Entry in Register of Marriages of the Church of the Advent—December 21, 1899.]**

#### **“MARRIAGES.**

“Thursday, December 21, 1899.

“Place: San Pablo. No. 2. Names: Alexander Dunsmuir and Josephine Wallace. Age of Alexander Dunsmuir, 46. Age of Josephine Wallace, 38. The residence of each is San Leandro. The parents’

(Testimony of Jerome F. Trivett.)

name and residence is given as San Leandro. Signature of Clergyman: W. C. Shaw. Witnesses and Remarks: James P. Taylor and Jas. Lowe."

On cross-examination the witness testified as follows:

I have been rector of the Church of the Advent since April, 1906. Personally I know nothing concerning the facts of this marriage. I know nothing about it except as finding it in the record-book. I did not see the entry made.

[**Testimony of James P. Taylor, for Defendant.**]

JAMES P. TAYLOR, called as a witness for defendant, after being duly sworn, testified as follows:  
[94]

I knew Alexander Dunsmuir in his lifetime. I first became acquainted with him about 1877 or 1878. I was one of his witnesses at his marriage to Josephine Wallace. I made the affidavit upon which this marriage license was obtained. In that affidavit I stated that he was a native of British Columbia and a resident of Alameda County. I had business relations here with him in San Francisco. These relations commenced in 1878. From that time my acquaintance with him was intimate. I called upon him several times at the Occidental Hotel and I knew him at the Grand Hotel. I also called on him at San Leandro. I believe he had the place over in San Leandro about a year. It was bought in Mrs. Wallace's name. They lived over there before they built the new house. I don't think he ever lived in the new house. They lived in the old house, but it

(Testimony of James P. Taylor.)

is my recollection that they did not live in the new house. The new house was not completed. There were times when he was traveling in Europe and at other times I should say he lived here in San Francisco about three-quarters of the year. He went away on trips and on his trips north he would spend a good deal of time in hunting. At times he stated to me that his home was in Victoria. My memory is not as good now as it was some time ago. I do not remember at how late a date his statement as to his home was made to me. I do not recollect that he ever said anything about intending to go to Victoria and stay there permanently. His home in the sense that we speak of our birth place and where our parents live was in Victoria. He was born in Nanaimo. I should say that his active business interests were here in San Francisco, that is, those that he had to look after personally. [95]

On cross-examination the witness testified as follows:

Mr. Dunsmuir had a regular business manager here during all the time that he was here.

Mr. THORNE (Counsel for Plaintiff):

Q. You say he was absent about a year in Europe; do you remember when that was?

A. I could not say.

Q. Do you remember about when it was?

A. No, I really could not say. I know he was absent but I cannot remember the time. He referred at times to Victoria as his home. I cannot say that I ever referred to his home as San Francisco.



(Testimony of James P. Taylor.)

On redirect examination the witness testified as follows:

Mr. Dunsmuir requested me to go and procure this marriage license for him, and told me to take such steps as were necessary to secure the license. In that connection I took it that he was a resident of San Leandro. I do not remember now whether he gave me any special authorization on that point or instructions on that matter. I could not be sure of it at this time. The only way in which he spoke of San Leandro as his residence was when I used to come over to San Francisco and frequently go back on the boat with him and then take the train and then sometimes go out to spend the evening and night with him, he would say in the office sometimes, "Well, James, let us go home." He said it in that colloquial or general way. After this invitation I would go over with him to San Leandro.

On recross-examination the witness testified as follows:

I cannot say so far as my memory goes that I had any [96] special instructions to put in the affidavit that his residence was Alameda County. I do not know that I knew at that time that he regarded Victoria as his home.

The COURT.—Q. If you knew that his residence was in Victoria you would not have sworn that his residence was in Alameda, would you?

A. No, I certainly would not. Alexander Dunsmuir lived at the Occidental and also at the Grand Hotels in San Francisco. I visited him there. At

(Testimony of James P. Taylor.)

the time he was living in San Leandro, he was living with Mrs. Wallace, but he was not married. After the marriage, they only lived there until the next day, when they left for New York. I may have testified before the British Consul on a commission issued by the Superior Court of the Province of British Columbia in the case of Hopper against Dunsmuir that Alexander Dunsmuir always told me that his residence was Victoria. I cannot recollect at this time.

**[Testimony of Obadiah Rich, for Defendant.]**

OBADIAH RICH, called as a witness for defendant, after being duly sworn, testified as follows:

During the years 1885 to 1890 I was manager of the Grand Hotel. Alexander Dunsmuir lived there part of that time. He was there from time to time. Mr. PIER (Counsel for Defendant):

Q. He would not keep his rooms there permanently?

A. Not always; no. He had three rooms. Josephine Wallace did not live with him there at that time. She had room 7, which was separate from his suite. I do not remember how long he lived there.

**[Testimony of P. M. Nevin, for Defendant.]**

P. M. NEVIN, called as a witness for defendant, after being duly sworn, testified as follows:

I knew Alexander Dunsmuir in his lifetime. I knew him in San Francisco and San Leandro. I was employed [97] by him both in San Francisco

(Testimony of P. M. Nevin.)

and San Leandro. I worked at the place in San Leandro, which was a place of about 315 acres. I understood this place was Mrs. Wallace's. I worked there first in the capacity of coachman. I went over there on the 12th of March, 1899, and I stayed there through his lifetime. I never heard him make any statement as to where his home was. I never heard him speak of San Leandro as his home, except that when I would take him to the train he would tell me he would be home on such and such a train, telling me what train he would be home on. I went to work for him here in San Francisco in 1893 as a teamster in the business. The only place I ever knew of him living at was at the Occidental. I heard he was living there. I knew he was at the Grand. I did not take particular notice as to how much time of each year he would spend at San Francisco. Every once in a while I would see him and then he would go away and then I would not see him for two or three months or six months. While he was at the Grand Hotel I worked for him as a regular teamster in the business.

On cross-examination the witness testified as follows:

I remember when Mr. Dunsmuir was married to Mrs. Wallace. Mr. Dunsmuir never lived at the new house. I was there all the time while the house was being constructed. The new house was not completed when they got married. It was not fit for occupancy when they got married. It was not fit for occupancy until after Mrs. Dunsmuir came

(Testimony of P. M. Nevin.)

home. The next day after their marriage they went to New York. They did not come back to San Leandro at all after they were married. They remained in Oakland that night and went [98] to New York the next day, I understand.

The plaintiff complaining of said judgment presents this Bill of Exceptions.

**[Order Settling and Allowing Bill of Exceptions, etc.]**

I, William C. Van Fleet, United States District Judge, in and for the Northern District of California, and being the Judge before whom and by whom the above-entitled action was tried, do hereby certify that the foregoing bill of exceptions, duly proposed and agreed upon by the counsel of the respective parties, is a true and correct bill of exceptions, that the same has been presented in due time, and is hereby settled, allowed and approved as and for the Bill of Exceptions in the above-entitled action, and is hereby made a part of the record herein.

Dated: February 7th, 1914.

WM. C. VAN FLEET.

United States District Judge.

**[Stipulation Re Bill of Exceptions.]**

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled action that the foregoing Bill of Exceptions has been presented in time and that the same may be approved, allowed and settled as and for the Bill of Exceptions in said action, and that

the same shall be made a part of the record in said action, all objections to said Bill of Exceptions and to the writ of error sued out by the plaintiff in this action to the United States Circuit Court of Appeals, Ninth Judicial Circuit, by reason of the fact that said Bill of Exceptions was not settled during the term of court at which the above-entitled action was tried or by reason of the fact that the same was not settled prior to the suing out of said [99] writ of error by plaintiff, being hereby expressly waived.

Dated February 7th, 1914.

ANDREW THORNE and  
WALTON C. WEBB,  
Attorneys for Plaintiff.

JNO. W. PRESTON,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed Feb'y 7, 1914. Walter B. Maling, Clerk. [100]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in place of AUGUST E. MUEN-  
TER, Collector of Internal Revenue),

Defendant.

**Petition for Writ of Error.**

James Dunsmuir, the plaintiff in the above-entitled action, feeling himself aggrieved by the final judgment of the above-entitled court entered in the above-entitled action on the 12th day of May, 1913, whereby it was adjudged that the plaintiff take nothing by said action and that the defendant therein have and recover of and from the plaintiff his costs of suit, now comes by Andrew Thorne and Walton C. Webb, Esqs., his attorneys, and hereby petitions said Court for an order allowing him, the said plaintiff, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit under and according to the laws of the United States in that behalf made and provided, to have reviewed therein the said judgment and other matters and things set forth in the assignment of errors accompanying this petition and for an order fixing the amount of security to be given by plaintiff in error, conditioned as the law directs; and prays that such writ of error do issue and that, upon giving such bond as may be required, all further proceedings in this Court be suspended, stayed and superseded until determination [101] of said writ of error by said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

Dated November, 10th, A. D. 1913.

JAMES DUNSMUIR,  
Plaintiff.

By ANDREW THORNE and  
WALTON C. WEBB,  
His Attorneys.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in place of AUGUST E. MUEN-  
TER, Collector of Internal Revenue),

Defendant.

**Assignment of Errors.**

Now comes James Dunsmuir, the plaintiff in the above-entitled action, by Andrew Thorne and Walton C. Webb, Esqs., his attorneys, and assigns and specifies the following errors, as the errors upon which he will rely and which he will urge upon his writ of error herein to reverse the judgment of the above-entitled court entered on May 12th, 1913, in the above-entitled action, to wit:

I.

The Court erred in overruling plaintiff's objection

to the introduction in evidence of Defendant's Exhibit "A," being certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company, which was offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above-mentioned certified copy of the Articles of Incorporation of said R. Dunsmuir's Sons Company, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, an exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, in the Superior Court of the State of California, in and for the City and [103] County of San Francisco, which document is marked Plaintiff's Exhibit No. 1, and reads as follows:

*"In the Superior Court of the State of California, in and for the City and County of San Francisco.*

DEPARTMENT 10.

In the Matter of the Estate of ALEXANDER DUNSMUIR, Deceased.

DECREE OF SETTLEMENT OF FINAL ACCOUNT AND OF FINAL DISTRIBUTION.

James Dunsmuir, as Executor of the Last Will and Testament of Alexander Dunsmuir, deceased, in and for the State of California, having on the 23d day of May, 1901, rendered and filed herein a final account and report of his administration of said Estate in the State of California, which said account was for a final settlement, and said James Dunsmuir, as Executor as aforesaid, having filed with



said account a petition for the final distribution of said Estate, and said account and petition having on the 3d day of June, 1901, come on regularly to be heard, due proof having been made to the satisfaction of the Court that notice has been given of the settlement of said account and of the hearing of said petition in the manner and for the time required by law;

And it appearing that said account of said Executor as rendered and filed herein is in all respects true and correct and that it is supported by proper vouchers;

That the said residue of money in the hands of said Executor belonging to the Estate of said deceased at the time of filing said final account was the sum of \$25,120.70, gold coin of the United States;

That since the rendition of said final account said Executor has not received to or for the use or benefit of said Estate any additional sum of money or property whatever [104] and has not made any disbursements whatever for the account of said Estate, and that for that reason he has not presented or filed herein any account supplemental to his said final account so heretofore rendered and filed herein;

That the sum of \$6,595.15 has been heretofore expended by him as necessary expenses of administration, the vouchers whereof together with a statement of such disbursements have been presented and filed, and said statement is now settled and allowed and all of said payments are hereby approved by this Court;

And it appearing that all claims and debts against

said decedent and said Estate and all taxes against said Estate have been fully paid and discharged;

That said testator, Alexander Dunsmuir, died on the 31st day of January, 1900, at the City, County and State of New York, and at the time of his death he was a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, as appears from the evidence, both oral and documentry, introduced upon the hearing of the petition for distribution, and that said testator at the time of his death left property in the City and County of San Francisco, State of California;

That said Alexander Dunsmuir left a Last Will and Testament dated December 21st, A. D. 1899, wherein said James Dunsmuir was appointed the Executor thereof;

That said Last Will and Testament of said Alexander Dunsmuir, deceased, was duly approved, allowed and admitted to probate in the Province of British Columbia by a judgment and decree dated February 26th, 1900, in the Supreme Court of British Columbia, and that said Last Will and Testament was executed according to the laws of the State of California, and also according to the law of the domicile of said testator. [105] And it appearing that said judgment and proof, allowance and admission to probate of said Last Will and Testament of said deceased in said Province of British Columbia has never been in whole or in part appealed from, revoked, set aside, modified or in any wise affected or at all, but that the same has become and is now absolute;

That the aforesaid Supreme Court of British Columbia was at all the times herein mentioned and is a court of competent and general jurisdiction and was at all said times and is a court of competent jurisdiction in the premises to pronounce, give and make such decree and the proof, allowance and admission to probate of the aforesaid will so duly and regularly given and made on the 26th day of February, 1900, and that said Court was and is the domiciliary forum in the premises;

That on the 26th day of April, A. D. 1900, said James Dunsmuir, the person named in said Will as Executor thereof and a person interested in said Will produced and filed in this court a copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof, duly authenticated, together with his petition for the issuance to him of letters testamentary thereon;

That thereafter such proceedings were had and taken in this court in the matter of said Estate of said deceased that on or about the 9th day of May, 1900, it was ordered, adjudged and decreed by the judgment and decree of this Court that said copy of the Will of said Alexander Dunsmuir, deceased, and the probate thereof so duly authenticated and produced and filed in this court on the 26th day of April, 1900, as aforesaid, be admitted to probate as the Last Will and Testament of said Alexander Dunsmuir, deceased, with the same force and effect as if said Will had been first admitted to [106] probate in this State, and that such judgment and decree was regularly given and made;

That by virtue of said judgment and decree last

aforesaid letters testamentary were ordered to be issued to said James Dunsmuir upon his giving a bond in the sum of \$308,000 as required by law and that thereafter on the 14th day of May, 1900, letters testamentary were duly issued to said James Dunsmuir, as Executor as aforesaid;

That said James Dunsmuir did give said bond so required of him by law for the faithful performance and execution of the duties of the trust as such Executor, with sufficient surety;

That said bond was in the manner and form and duly approved as required by law and that said James Dunsmuir duly qualified as such Executor and entered upon the discharge of his duties as such and that ever since said time has been and now is the sole Executor of the said Last Will and Testament of said deceased in and for the State of California;

That immediately after his said appointment and qualification as Executor as aforesaid he caused to be published in a newspaper of general circulation printed, published and circulated in said City and County of San Francisco a notice to the creditors of said decedent and all persons having claims against said Alexander Dunsmuir to exhibit and present their said claims against the said deceased according to law;

That more than ten months have elapsed since the first publication of said notice to creditors;

That a decree showing due and legal notice to the creditors of and all persons having claims against said decedent and his said Estate has been heretofore duly and regularly given, made and entered by this court;

That all debts of said deceased and of said Estate and all expenses of administration thereof and all taxes that have attached to or accrued against said Estate and its property [107] have been paid and discharged and that said Estate is now in a condition to be closed.

And it appearing in and by the terms of said Last Will and Testament of said deceased that all the estate and property of the said deceased, both real and personal wheresoever situate, was given, devised and bequeathed to James Dunsmuir, a brother of said deceased;

And it appearing to the satisfaction of this Court that said Alexander Dunsmuir, deceased, at the time of his death left him surviving as his only heirs at law the following persons, that is to say:

Josephine Dunsmuir, widow of said deceased, and Joan Olive Dunsmuir, mother of said deceased;

That said James Dunsmuir, as Executor as aforesaid, has this day filed in this court in writing his waiver and renunciation of all commissions and compensation for his services as such Executor and has also made such waiver and renunciation in open court at this hearing;

And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in

furtherance of said previous understanding and agreement entered into an agreement with said Josephine Dunsmuir, in full settlement of her claims as widow upon the Estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime. [108]

And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this Estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that, therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax;

It is now, therefore, ordered that out of and from the rest, residue and remainder of the property now remaining in the hands of said James Dunsmuir, as Executor as aforesaid, there be paid the following sums of money, that is to say:

For estimated expenses of closing the said Estate of said deceased, five dollars;

To Messrs. Wilson & Wilson, as attorneys for said Executor in the administration of said Estate the sum of five thousand dollars, to be paid to them in full for all professional services rendered in said Estate and to said Executor as such to the date hereof, leaving a balance of \$20,115.70 now in the hands of said Executor belonging to said Estate;

And it appearing to the satisfaction of this Court that said estate is now in a condition to be closed and

finally distributed to the persons lawfully entitled thereto;

Now, therefore, it is ordered, adjudged and decreed that said final account of said James Dunsmuir, as Executor of the Last Will and Testament of said Alexander Dunsmuir, deceased, be and the same is hereby settled, allowed and approved as presented and filed herein. [109]

It is further ordered, adjudged and decreed that all the rest, residue and remainder of said Estate hereinafter particularly described and any other property known or not known or discovered which may belong to the said Estate of said Alexander Dunsmuir, deceased, or in which said Estate may have any interest, be and the same is hereby distributed to James Dunsmuir, said brother of said deceased, and that the same is not subject to the payment of any collateral inheritance tax;

The following is a particular description of the said residue of said Estate referred to in this decree and of which distribution is now ordered, as aforesaid, that is to say:

Twenty thousand one hundred and fifteen dollars and seventy cents in cash;

Four thousand nine hundred and ninety-eight shares of the capital stock of the R. Dunsmuir's Sons' Company, a corporation, organized and existing under the laws of the State of California.

Done in open court this 3d day of June, A. D. 1901.

JAS. M. TROUTT,  
Judge.

Recorded October 3d, 1901.

[Endorsed]: Filed Jun. 3, 1901. Wm. A. Deane, Clerk. By V. F. Northrop, Deputy Clerk."

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company, which reads as follows:

"ARTICLES OF INCORPORATION  
of the

R. Dunsmuir's Sons Company. [110]

Know all men by these Presents, that we, whose names are hereunto subscribed, have this day voluntarily associated ourselves for the purpose of forming, and do together form a corporation, under the laws of the State of California.

And we hereby certify,

First: The name of the incorporation is

R. Dunsmuir's Sons Company.

Second: The purposes for which it is formed, are, to acquire, own, hold, improve, lease and dispose of lands, and interests in lands; to acquire, build, construct, own, hold, manage and use wharves, docks, basins, dry-docks, piers and warehouses, or any interest in the same; to borrow and loan money; to engage in, and carry on the business of commerce, foreign and domestic; to build, equip, furnish, or buy and sell, or charter ships and vessels, and navigate the same; to purchase, take, hold, and use shares of the capital stock of other corporations, or membership therein; to purchase, acquire and use personal property of every name and description, to act as agents for other persons or corporations in the transaction



of business; to locate, acquire, hold, develop and operate mines of precious or valuable ores, metals and other substances, and deal in and with the products of mines of every kind or nature; to sell, convey, grant, mortgage, hypothecate or otherwise dispose of property, real or personal, and generally, to do and transact any business for which individuals may lawfully associate themselves, and which are not prohibited by the laws of the State of California.

Third: The place where its principal business is to be transacted is the City and County of San Francisco, in the State of California.

Fourth: The term for which it is to exist is fifty-years.

Fifth: The number of its Directors is five, and the [111] names and residences of those who are appointed for the first year, are

| Name.                      | Residence.                  |
|----------------------------|-----------------------------|
| Alexander Dunsmuir,        | San Francisco, California.  |
| James Dunsmuir,            | Victoria, British Columbia. |
| James T. Boyd,             | San Francisco, California.  |
| Cavalier Hamilton Jouett,  | San Francisco, California.  |
| Walter Alexander Gompertz, | Berkeley, California.       |

Sixth: The amount of its capital stock is One Million Dollars, divided into ten thousand shares, of the par value of one hundred dollars each.

Seventh: The amount of said Capital Stock which has been actually subscribed is one million dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

| Names of Subscribers.     | No. of Shares. | Amount.   |
|---------------------------|----------------|-----------|
| Alexander Dunsmuir        | 4,998          | \$499,800 |
| James Dunsmuir            | 4,998          | 499,800   |
| James T. Boyd             | 2              | 200       |
| Cavalier H. Jouett        | 1              | 100       |
| Walter Alexander Gompertz | 1              | 100       |

In witness whereof, we have hereunto set our hands and seals, this Twenty-seventh day of February, A. D. 1896.

JAMES DUNSMUIR. (Seal)

ALEXANDER DUNSMUIR. (Seal)

JAMES T. BOYD. (Seal)

CAVALIER HAMILTON JOUETT. (Seal)

WALTER ALEXANDER GOMPERTZ. (Seal)

Signed and sealed by James Dunsmuir in the presence of

CHAS. E. POOLEY,

By ALEXANDER DUNSMUIR,

JAMES T. BOYD,

CAVALIER HAMILTON JOUETT and

WALTER ALEXANDER GOMPERTZ,

JAMES MASON. [112]

State of California,

City and County of San Francisco,—ss.

On this seventh day of March, in the year one thousand eight hundred and ninety-six, before me, James Mason, a notary public, in and for the said City and County, duly commissioned and sworn, personally appeared, Alexander Dunsmuir, James T. Boyd, Cavalier Hamilton Jouett and Walter Alexander Gompertz, known to me to be the persons described in, whose names are subscribed to and who executed the

within and annexed instrument and they duly acknowledged that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] JAMES MASON,  
Notary Public in and for the City and County of San Francisco, State of California.

United States Consulate,  
British Columbia,  
Victoria, B. C., Feb'y 27th, 1896.

I, M. R. Eure, Vice-Consul of the United States, at Victoria, B. C., do hereby certify that on this 27th day of February, 1896, James Dunsmuir, who is known to me to be the same individual who executed the annexed written instrument, personally appeared before me and acknowledged that he had signed and sealed said instrument freely and voluntarily for the purpose and consideration therein stated.

In witness whereof, I have hereunto set my hand, and affixed the seal of the Consulate, at Victoria, B. C., this day and year (Seal) next above written, and of the Independence of the United States the one hundred and twentieth.

M. R. EURE,  
Vice-Consul of the United States." [113]

Upon said last-mentioned document being so offered in evidence the following proceedings occurred:

"Mr. PIER (Counsel for Defendant).—I want at this time to introduce in evidence a certified copy,

certified by The Secretary of State, of the Articles of Incorporation of the R. Dunsmuir's Sons & Company, which gives the residence of Alexander Dunsmuir, at San Francisco, California. The Code specifically provides that each of the incorporators shall give his name and residence. This was done in the regular course of business.

The COURT.—Is it sworn to?

Mr. PIER.—The Articles of Incorporation were acknowledged before James Mason.

Mr. THORNE (Counsel for Plaintiff).—We object to the introduction of this document in evidence upon the ground that it is immaterial, irrelevant and incompetent, and further that it is an attempt to impeach the judgment of a court of competent jurisdiction, namely, the Superior Court of the State of California, in and for the City and County of San Francisco, adjudging that Alexander Dunsmuir was a resident domiciled in Victoria at the time of his death (referring to the above-mentioned decree of settlement of final account and of final distribution in the matter of the estate of said Alexander Dunsmuir, deceased), and that being a judgment *in rem*, this amounts to a collateral attack upon that judgment.

The COURT.—The objection is overruled.

Mr. THORNE.—We take an exception.”

The said document was thereupon admitted in evidence.

## II.

The Court erred in overruling plaintiff's objection to the introduction in evidence of Defendant's Exhibit "B," being certified copy of the will of Alexander Dunsmuir, deceased, which [114] was

offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above-mentioned certified copy of the will of said Alexander Dunsmuir, deceased, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number I.

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the will of said Alexander Dunsmuir, deceased, which reads as follows:

“I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke all wills and testamentary dispositions by me heretofore made and declare this to be my last will and testament. I give, devise and bequeath all my property, both real and personal, wheresoever situate, unto my brother, James Dunsmuir, of Victoria, Province of British Columbia, absolutely, and I appoint the said James Dunsmuir sole executor of this my will. In testimony whereof I have hereunto set my hand this twenty-first day of December, One thousand eight hundred and ninety-nine.

ALEXANDER DUNSMUIR.

Signed by the Testator as and for his last will and testament in the presence of us, who at his request, in *this* presence, and in the presence of each other, have

hereunto subscribed our names as witnesses.

JAS. LOWE,

Sausalito, Cal.

JAMES P. TAYLOR,

Oakland, Cal. [115]

[Endorsed]: Filed Jan. 4, 1912. H. I. Mulcrevy, Clerk. By E. B. Gilson, Deputy Clerk.”

Upon said last mentioned document being so offered in evidence the following proceedings occurred:

“Mr. PIER (Defendant’s Counsel).—I wish to introduce a certified copy of the Will of Alexander Dunsmuir. This is a certified copy of the authenticated copy of the last will and testament of Alexander Dunsmuir, restored by order of court on the 4th day of January, 1912. This is the record in the Superior Court where the will was probated, where probate was made upon the estate of Alexander Dunsmuir here upon an authenticated copy of the will. I have here a certified copy of that restored will. I wish to introduce that in evidence. In this will Alexander Dunsmuir refers to him as of San Francisco, California.

Mr. THORNE (Counsel for Plaintiff).—We object to it upon the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach a judgment *in rem*, a conclusive judgment (referring to the above-mentioned decree of settlement of final account and of final distribution in the matter of the estate of said Alexander Dunsmuir, deceased). It amounts to a collateral attack upon the judgment (referring to said decree). On the further ground

that the terms of the will were merged in the decree (referring to said decree). The question of domicile cannot be proven in this way. No evidence can be introduced by means of this will to impeach the decree admitting this will to probate, and also the decree of distribution, because the will and the terms of the will are all merged in the decree of distribution. I have a number of cases on that point, your Honor.

The COURT.—Yes, that would be all right if the judgment was conclusive, but I hold the judgment in probate is not conclusive [116] on this Court at all on the question of residence.

Mr. THORNE.—We take an exception.”

The said document was thereupon admitted in evidence.

### III.

The Court erred in overruling plaintiff's objection to the introduction in evidence of Defendant's Exhibit "C," being certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, which was offered in evidence on behalf of defendant upon his own case.

Upon plaintiff's case and prior to the offer in evidence of the above mentioned certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number 1.

Upon defendant's case, as above stated, there was offered in evidence upon his behalf the above-mentioned certified copy of the marriage license of said Alexander Dunsmuir and Josephine Wallace, which reads as follows:

“MARRIAGE LICENSE.

State of California. County of Contra Costa.

These presents are to authorize and license any Justice of the Supreme Court, Judge of the Superior Court, Justice of the Peace, Priest or Minister of the Gospel of any denomination, to solemnize within said county the marriage of Alexander Dunsmuir, native of British Columbia, age 46 years, a resident of Alameda County California, and Josephine Wallace, native of New York, aged 38 years, a resident of Alameda Co., California, they being of sufficient age to contract marriage. [117]

In Witness whereof, I have hereunto set my hand and affixed the Seal of the Superior Court of said County, this 19th day of December, A. D. 1899.

J. E. RODGERS,  
County Clerk.

By \_\_\_\_\_,  
Deputy Clerk.

State of California,  
County of Contra Costa.

This certifies, that I, Wm. C. Shaw, a clergyman of the County of Contra Costa, united in Marriage at San Pablo in the County of Contra Costa on this Twenty-first day of December, A. D. 1899, Alexander Dunsmuir, native of British Columbia, aged 46 years, residing at San Leandro, California, and



Josephine Wallace, native of New York, aged 38 years, residing at San Leandro, California; as authorized by the within license, and in accordance with the laws of the State of California.

W. C. SHAW,

(Official character) Clergyman.

(10c revenue stamp.)

A. E. D.

Jan'y 22, 1900.

Witnesses:

JAMES P. TAYLOR,

Residing at Oakland, California.

JAS. LOWE,

Residing at Sausalito, California.

Recorded at request of J. P. Taylor this 22d day of January, A. D. 1900, at 35 minutes past 1 P. M. A. E. Dunkel, County Recorder."

Upon said last mentioned document being so offered in evidence the following proceedings occurred:

"Mr. PIER (Counsel for Defendant).—I want to introduce in evidence a certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace, in which he describes himself as a resident of Alameda County, California. This is a certified [118] copy from the County Recorder of the County of Contra Costa, where the marriage license was issued.

Mr. THORNE (Counsel for Plaintiff).—This is objected to upon the grounds that it is immaterial, and irrelevant and is an attempt to impeach collaterally the judgment of the Superior Court of the

City and County of San Francisco, State of California, namely, the decree of distribution in the Estate of Alexander Dunsmuir, Deceased, wherein the domicile of the decedent in that proceeding is determined as being in British Columbia and furthermore, upon the ground that this marriage license is not evidence of any fact concerning residence for the reason that it is not sworn to or signed by Alexander Dunsmuir, and it does not appear that any authority was given by Alexander Dunsmuir to sign the same.

Mr. PIER.—I will establish that by another witness; that is the authority.

The COURT.—What do you mean—you will establish what?

Mr. PIER.—Counsel says that there is no evidence of any authority being given.

The COURT.—The law requires first certain things to be stated in applying for a marriage license; among other things, residence. That is the act of a public officer, and a public officer is presumed to do his duty, and to write the fact in accordance with the fact as it is presented to him. The objection is overruled.

Mr. THORNE.—We take an exception.”

The said document was thereupon admitted in evidence.

#### IV.

The Court erred in overruling plaintiff's objection to the introduction in evidence of the following entry in the register of marriages of the Church of the Advent in Oakland, which entry was offered in evidence

on behalf of defendant upon his own [119] case, viz:

“MARRIAGES.

“Thursday, December 21, 1899.

“Place: San Pablo. No. 2. Names: Alexander Dunsmuir and Josephine Wallace. Age of Alexander Dunsmuir, 46. Age of Josephine Wallace, 38. The residence of each is San Leandro. The parents' name and residence is given as San Leandro. Signature of Clergyman: W. C. Shaw. Witnesses and Remarks: James P. Taylor and J. A. S. Lowe.”

Upon plaintiff's case and prior to the offer in evidence of said entry in said register of marriages, there had been offered upon plaintiff's behalf and admitted in evidence by the Court, the exemplified copy of the decree of settlement of final account and of final distribution in the matter of the estate of Alexander Dunsmuir, deceased, hereinabove set forth in assignment number 1. Upon said entry in said register of marriages being offered in evidence upon defendant's case, as aforesaid, counsel for plaintiff objected to the introduction of the same as immaterial, irrelevant and incompetent and as an attempt to impeach the above mentioned decree, wherein it is decreed that said Alexander Dunsmuir, deceased, was domiciled in British Columbia, and to collaterally attack the same. The objection was overruled and an exception taken by plaintiff. The said entry was thereupon admitted in evidence.

V.

The Court erred in finding, as set forth in its

opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not a resident of Victoria, British Columbia, at the time of his death.

## VI.

The Court erred in finding, as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not domiciled in British Columbia at the [120] time of his death.

## VII.

The Court erred in finding, as set forth in its opinion rendered in the above-entitled action in May 12th, 1913, that Alexander Dunsmuir was a resident of the State of California, United States of America, at the time of his death.

## VIII.

The Court erred in finding, as set forth in its opinion rendered in the above entitled action on May 12th, 1913, that Alexander Dunsmuir was domiciled in the State of California, United States of America, at the time of his death.

## IX.

The evidence is insufficient and there is no evidence to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was not a resident of Victoria, British Columbia, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was a resident of Victoria, British Columbia, at the time of his death.

## X.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th 1913, that Alexander Dunsmuir was not domiciled in British Columbia at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was domiciled in British Columbia, at the time of his death.

## XI.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was a resident of the State of California, [121] United States of America, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was a resident of Victoria, British Columbia, at the time of his death.

## XII.

The evidence is insufficient and there is no evidence, to sustain the finding of the Court as set forth in its opinion rendered in the above-entitled action on May 12th, 1913, that Alexander Dunsmuir was domiciled in the State of California, United States of America, at the time of his death, for the reason that the evidence shows that Alexander Dunsmuir was domiciled in British Columbia, at the time of his death.

WHEREFORE, said James Dunsmuir, the plaintiff in said action and plaintiff in error upon said

writ of error, prays that the judgment of said Court be reversed, etc.

Dated November 10th, 1913.

ANDREW THORNE,  
WALTON C. WEBB,  
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [122]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Divi-  
sion.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E.  
MUENTER, Collector of Internal Revenue),  
Defendant.

**Order Allowing Writ of Error [and Fixing Amount  
of Bond].**

Upon motion of Andrew Thorne and Walton C. Webb, Esqs., attorneys for the plaintiff in the above-entitled action, and upon filing by plaintiff of a petition for a writ of error and assignment of errors herein;

IT IS HEREBY ORDERED, that a writ of error be, and the same is hereby, allowed to the plaintiff in this action to the United States Circuit Court of

Appeals for the Ninth Judicial Circuit, to have reviewed therein the judgment heretofore entered herein and other matters and things in said petition and assignment set forth;

AND IT IS FURTHER ORDERED that the amount of the bond to be given by said plaintiff upon such writ of error be and the same is hereby fixed at the sum of \$500.00, such bond to be conditioned as required by law.

Dated November 10th, A. D. 1913.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Division.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E.  
MUENTER, Collector of Internal Revenue),  
Defendant in Error.

**Writ of Error Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That SOUTHWESTERN SURETY INSURANCE  
COMPANY, a corporation duly organized and

existing under and by virtue of the laws of the State of Oklahoma, United States of America, and duly licensed and authorized to execute and act as surety on bonds and undertakings and to give and execute this bond and undertaking, is, upon behalf of the above-named James Dunsmuir, plaintiff in error in this action, held and firmly bound unto the above-named Joseph J. Scott, Collector of Internal Revenue (substituted in place of August E. Muentner, Collector of Internal Revenue), defendant in error in this action, in the full and just sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be paid to the said defendant in error, his attorneys, successors, administrators, executors, or assigns, for which payment well and truly to be made said SOUTHWESTERN SURETY INSURANCE COMPANY, binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such that:

WHEREAS, in the above-entitled, action, wherein the above-named plaintiff in error was plaintiff, and the above-named August E. Muentner, Collector of Internal Revenue, was [124] defendant (in whose place and stead the above-named Joseph J. Scott, Collector of Internal Revenue, was thereafter substituted as defendant), final judgment was entered in the above-entitled Court on the 12th day of May, 1913, adjudging that the plaintiff take nothing by said action and that the defendant therein have and recover of and from the plaintiff his costs of suit; and

WHEREAS, the above-named plaintiff in error has obtained a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Judi-



cial Circuit, to reverse said judgment, and has been directed to give on such writ of error a bond in the sum of Five Hundred (\$500.00) Dollars, such bond to be conditioned as required by law;

NOW, THEREFORE, if the said James Duns-  
muir, plaintiff in error in this action, shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation shall be void, else to remain in full force and virtue.

AND IT IS HEREBY expressly agreed by said SOUTHWESTERN SURETY INSURANCE COMPANY, that, in case of a breach of any condition of this bond, the above-named District Court of the United States, in and for the Northern District of California, may, upon notice to said SOUTHWESTERN SURETY INSURANCE COMPANY, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which it is bound to pay on account of such breach and render judgment therefor against it and award execution therefor.

IN WITNESS WHEREOF the said SOUTHWESTERN SURETY INSURANCE COMPANY, has duly caused its name and seal to be hereunto affixed by its Resident Vice-President and Resident Assistant Secretary, at San Francisco, California, this TENTH day of November, A. D. 1913.

SOUTHWESTERN SURETY INSURANCE COMPANY,

By EDWARD P. SPENGLER,  
Resident Vice-president. [125]

[Seal]

And by A. MULLEN,  
Resident Assistant Secretary.

The foregoing bond is hereby approved this 10th day of November, A. D. 1913.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Nov. 10, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

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**[Certificate of Clerk U. S. District Court to Transcript of Record.]**

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 14,703.

JAMES DUNSMUIR,

Plaintiff,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E. MUENTER, Collector of Internal Revenue),

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred and twenty-six (126) pages, numbered from 1 to 126, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing re-



the said District Court, before you, or some of you, between James Dunsmuir, plaintiff in error, and Joseph J. Scott, Collector of Internal Revenue (Substituted in place of August E. Muentner, Collector of Internal Revenue), defendant in error, a manifest error hath happened to the great damage of the said James Dunsmuir, plaintiff in error, as by his complaint appears.

And we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings [128] aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 10th day of December, 1913, next, in the said United States Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, District Judge of the United States, this the 10th day of November, in the year of Our Lord One



nue), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed March 10, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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**[Order Enlarging Time to and Including January  
10, 1914, to File Record, etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals for the  
Ninth Judicial Circuit.*

JAMES DUNSMUIR,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue  
(Substituted in Place of AUGUST E. MUEN-  
TER, Collector of Internal Revenue),

Defendant in Error.

ORDER UNDER RULE 16, SECTION 1, EN-  
LARGING TIME WITHIN WHICH TO  
FILE RECORD ON WRIT OF ERROR AND  
TO DOCKET CAUSE.

GOOD CAUSE APPEARING THEREFOR, IT  
IS HEREBY ORDERED that the plaintiff in error  
in the above-entitled cause may have, and he is hereby  
granted, to and including the 10th day of January,

No. 2386.

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IN THE

**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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JAMES DUNSMUIR,

*Plaintiff in Error,*

VS.

JOSEPH J. SCOTT, Collector of Internal  
Revenue (Substituted in Place of August  
E. Muentner, Collector of Internal Revenue),

*Defendant in Error.*

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BRIEF OF PLAINTIFF IN ERROR.

This action was brought by James Dunsmuir, admitted at all times to be domiciled in British Columbia, a legatee under the will of Alexander Dunsmuir, deceased, to recover from the United States Collector of Internal Revenue for the First Collection District of the State of California the sum of \$2,968.80 paid by him under protest to such Collector as a tax under the provisions of the War Revenue Act of June 13th, 1898, upon the legacy received by him as such legatee. The recovery of the tax is sought, as alleged in the complaint, upon two grounds, first: that said

Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death (it having been held, as this Court undoubtedly knows, by the Supreme Court of the United States, in the cases of *Eidman vs. Martinez*, 184 U. S. 578, and *Moore vs. Ruckgaber*, 184 U. S. 593, that the portion of the personal estate situated in this country of a person domiciled in a foreign country is not subject to the legacy tax imposed by said War Revenue Act), and second: that said legacy has no taxable value by reason of the fact that it is burdened with an annuity of \$25,000.00. All of the material allegations of the complaint are admitted by the defendant except the above referred to allegations that said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death and that said legacy has no taxable value by reason of the fact that it is burdened with an annuity of \$25,000.00. The defendant does deny that he collected the tax by force and duress and that the same was involuntarily paid, but, as he admits the allegations of the complaint as to his demand for the tax, payment of the same under written protest (setting forth the grounds thereof) and the presentation of a claim to the Commissioner of Internal Revenue for the refunding of the tax and the rejection thereof, such denials are merely denials of conclusions of law, the admitted allegations being sufficient under the decisions of the United States Courts (*Wright vs. Blakeslee*, 101 U. S. 174; *Stewart vs. Barnes*, 153 U. S. 456, and *Schmitt vs. Trowbridge*, 21 Fed. Cases No. 12468) to show that the



tax was involuntarily paid and to entitle the plaintiff to recover the tax if the same be illegal.

It will be seen, therefore, that there were only two issues to be passed upon by the District Court, namely: the question as to whether or not said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death, and the further question as to whether or not said legacy had no taxable value by reason of the fact that it was burdened with an annuity of \$25,000.00. Although the trial Court made no findings, the judgment in favor of the defendant necessarily found both of these questions in his favor. If either thereof had been found in favor of the plaintiff, judgment must have gone for him.

It is our intention to raise the point that there is not sufficient evidence, and, in reality, no evidence at all, to support either of these implied findings. Of course, in raising this point we are not unmindful of the rule in the United States Courts to the effect that the question of the insufficiency of the evidence to support the judgment cannot be raised where there are no findings. We respectfully submit, however, that this rule is not, and should not be held to be, applicable to our case. The reason for the rule undoubtedly is that, where there are no findings, the appellate court cannot usually know what facts were found in favor of the plaintiff and what facts in favor of the defendant, as the lower Court may have found certain, although not all, of the facts in favor of the party who is given judgment. This being so, the rule has been adopted that where there are no find-

ings the question of the insufficiency of the evidence to support the judgment cannot be raised. But the reason of this rule does not apply to our case, and, when the reason fails, the rule itself fails. As above stated, we do not need any findings to determine what the District Court decided. It necessarily found against both of the above mentioned allegations of the complaint, to-wit: that said Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death and that said legacy had no taxable value by reason of the fact that it was burdened with an annuity of \$25,000.00.

We have searched diligently in order to find authorities upon the question as to whether or not findings are necessary in order to raise the question of the insufficiency of the evidence where, without findings, it is evident as to what the Court did actually find, but we have been unable to find any authorities whatsoever, either one way or the other. We respectfully submit, however, that a rule of this character should rather be limited than extended in its application, and is not to be applied to a case like ours, which really does not come within its meaning or object.

We are not offering as a legal excuse that we overlooked the rule of the District Court (which, as this Court undoubtedly knows, is exactly contrary to our state statute) requiring a party to request findings on or before the submission of the cause for decision. We simply desire to call attention to the fact that this rule was inadvertently overlooked by us. And we would request this Court to examine the evidence to ascer-

tain whether or not there is any evidence to support either of the two above mentioned findings necessarily involved in the judgment rendered by the Court in favor of the defendant. If the Court does this it is doing no more than it would have to do if the District Court had made express findings upon these two issues. This being so, we feel we are not asking this Court to do something that it cannot conscientiously or legally do.

There are, in addition to the specifications of error hereinafter mentioned, three points we desire to make on this writ of error, the determination of any one of which in our favor requires a reversal of the judgment. They are as follows:

#### FIRST.

THE DECREE OF FINAL DISTRIBUTION MENTIONED IN PARAGRAPH 5 OF THE COMPLAINT (TRANSCRIPT, PAGE 3), THE ALLEGATIONS OF WHICH PARAGRAPH OF THE COMPLAINT ARE ADMITTED BY THE DEFENDANT, CONCLUSIVELY DETERMINES THAT SAID ALEXANDER DUNSMUIR, DECEASED, WAS DOMICILED IN BRITISH COLUMBIA AT THE TIME OF HIS DEATH.

#### SECOND.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING OF THE DISTRICT COURT THAT SAID ALEXANDER DUNSMUIR, DE-

CEASED, WAS NOT DOMICILED IN BRITISH COLUMBIA AT THE TIME OF HIS DEATH.

### THIRD.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING OF THE DISTRICT COURT THAT SAID LEGACY HAD A TAXABLE VALUE EVEN THOUGH IT WAS BURDENED WITH AN ANNUITY OF \$25,000.00.

The specifications of error upon which we rely are directed against certain rulings of the District Court admitting in evidence certain documents over our objections that the same were inadmissible as being in contradiction of the above mentioned decree of distribution which was conclusive as to the fact that said Alexander Dunsmuir was domiciled in British Columbia at the time of his death. It will be seen, therefore, that a determination of the first of our above mentioned points will determine also the correctness or incorrectness of these rulings. It is apparent also that a knowledge of the contents of said decree of distribution is necessary before said rulings can be passed upon. We will, therefore, give a brief summary of the provisions of said decree before stating the specifications of error upon which we rely.

The decree, which was introduced in evidence and is contained in the bill of exceptions, is found on pages 32 to 42 inclusive of the transcript. The decree was made by the Superior Court of the City and County of San Francisco, State of California, on

the 3rd day of June, 1901, and finds that said Alexander Dunsmuir, deceased, died on January 31st, 1900, at the City, County and State of New York, being at the time of his death a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco. It further finds that said Alexander Dunsmuir, deceased, left a will dated December 21st, 1899, which will was originally probated in British Columbia and was thereafter, by exemplified copy of the same and of the probate thereof, admitted to probate on ancillary proceedings in said Superior Court of the City and County of San Francisco, State of California. The decree further finds that the said will bequeaths all of the property of said Alexander Dunsmuir, deceased, to said James Dunsmuir, the plaintiff and plaintiff in error in this action, but according to a previous understanding and agreement that he was to make suitable provision for Josephine Dunsmuir, the widow of said deceased, during her life, which understanding and agreement had been consummated by said James Dunsmuir executing with said Josephine Dunsmuir an agreement in full settlement of her claims as widow upon the estate of said deceased, whereby he bound himself to pay her an annuity during her lifetime. It further finds that, by reason of said agreement, the then cash value of the annuity was greater than the value of the property passing to said James Dunsmuir under said will and that on account thereof the same was not subject to the payment of an in-

heritance tax, and distributed said property to said James Dunsmuir. This property is the property upon which the tax involved in this suit was levied.

The above mentioned specifications of error are as follows:

### I.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, defendant's exhibit "A," being certified copy of the Articles of Incorporation of R. Dunsmuir's Sons Company (set forth on pages 136-139 of the transcript), which are dated February 27th, 1896, are signed and acknowledged by said Alexander Dunsmuir and recite his residence as being "San Francisco, California."

### II.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, defendant's exhibit "B" being certified copy of the will of Alexander Dunsmuir, deceased (set forth at pages 141-142 of the transcript), which is signed by him, is dated December 21st, 1899, and recites as follows: "I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke," etc.

## III.

That the Court erred in admitting in evidence, over plaintiff's objection, that the same was inadmissible as being in contradiction of the above mentioned decree of distribution and that the same was not evidence of any fact concerning residence for the reason that it was not sworn to nor signed by said Alexander Dunsmuir and it did not appear that any authority was given by him to sign the same, defendant's exhibit "C" being certified copy of the marriage license of Alexander Dunsmuir and Josephine Wallace (set forth at pages 144-145 of the transcript), which states the residence of Alexander Dunsmuir as being Alameda County, California.

## IV.

That the Court erred in admitting in evidence, over plaintiff's objection that the same was inadmissible as being in contradiction of the above mentioned decree of distribution, the entry in the register of marriages of the Church of the Advent in Oakland, reciting that Alexander Dunsmuir was a resident of San Leandro. (Page 47 of the transcript.)

We will now proceed to discuss the above mentioned points and specifications of error in the order in which they are set forth.

## FIRST POINT.

The above mentioned decree of distribution establishes conclusively that Alexander Dunsmuir, deceased, was domiciled in British Columbia at the

time of his death. The facts in regard to this decree are set forth in paragraph 5 of the complaint (transcript, page 3), which facts are admitted by the answer of the defendant, who simply contents himself with alleging in paragraph V of his answer (transcript, page 14), that said Alexander Dunsmuir, deceased, died a resident of the City and County of San Francisco, State of California, and that, if ancillary administration was allowed in the Superior Court of the City and County of San Francisco, State of California, it was without jurisdiction and of no effect. But the defendant, as we shall subsequently show, is not in a position to attack these probate proceedings.

The allegations of said paragraph 5 of the complaint (transcript, page 3), which allegations are, as above stated, admitted by the answer, are that the will of Alexander Dunsmuir, deceased, was, by duly authenticated copy, on the 9th day of May, 1900, admitted to probate in the Superior Court of the City and County of San Francisco, State of California, and that thereafter and after due proceedings in ancillary administration, the estate of said deceased in the State of California was by said decree of distribution distributed to the plaintiff; and that said decree has become final and absolute. And the said decree of distribution (transcript, pages 32-42), as above mentioned, finds that Alexander Dunsmuir, deceased, was domiciled in British Columbia at the time of his death. It was necessary that the Superior Court of the City and County of San Francisco, State of Cali-



fornia, should so find in order that that Court should have jurisdiction to admit the will of said deceased to probate on ancillary proceedings. For, under the statutes of the State of California if Alexander Duns-  
muir, deceased, had been a resident of the City and County of San Francisco, as claimed by the defendant, said Superior Court would not have had jurisdiction to probate the will of the deceased by an authenticated copy thereof. In that event the will must have been originally probated in the City and County of San Francisco, State of California. (See *Estate of Clark*, 148 Cal. 108.) The said decree having become final and absolute, as alleged in said paragraph 5 of the complaint and admitted by the answer, it cannot now, under the decisions of the Supreme Court of the State of California, be collaterally attacked on the ground of lack of jurisdiction as it is not void upon its face. See the cases of *Dunsmuir vs. Coffey*, 148 Cal. 137, and *Estate of Dunsmuir*, 149 Cal. 67, involving these very probate proceedings that are now under discussion, which had been attacked, as they are here attacked, on the ground that Alexander Dunsmuir, deceased, was a resident of the City and County of San Francisco, State of California, at the time of his death and not of British Columbia. In these cases the Supreme Court of the State of California held, however, in answer to this contention, that, as the proceedings had become final and showed upon the face thereof that the Superior Court of the City and County of San Francisco, State of California, had jurisdiction to probate the authenticated copy of the

will of Alexander Dunsmuir, deceased, they could not be collaterally attacked on the ground of lack of jurisdiction.

If these proceedings are unassailable collaterally by everyone else, can the United States, acting through the defendant, attack them in this collateral proceeding? Surely not, as the United States is bound by a decree of a State Court just as an ordinary suitor is bound and in the same way and to the same extent. (See *State of Iowa vs. Carr*, 191 Fed. 257; *Waples' Proceedings in Rem.*, Sec. 112, p. 159, and *Fendall vs. U. S.*, 14 Court of Cl. 247.) This becomes doubly obvious when we remember that the defendant in order to show that he had a right to collect the tax must rely upon these very ancillary probate proceedings in the Superior Court of the City and County of San Francisco, State of California, which he is now seeking to attack.

It cannot be assumed that there were any original probate proceedings in the City and County of San Francisco, as would have been necessary if defendant's contention that the decedent was a resident of said City and County was correct, since it appears by the complaint, which allegations are admitted by the answer, that said ancillary probate proceedings in the City and County of San Francisco have become final and absolute. Furthermore, there is no claim made that there ever were any original probate proceedings in the City and County of San Francisco. It must be taken as established, therefore, that there were no other probate proceedings and that said ancillary

probate proceedings are the only probate proceedings to which the defendant could look as a basis for the collection of the tax. It is true that in paragraph 4 of the complaint it is alleged that the will was originally probated in British Columbia, but, as defendant particularly and specifically denies the allegations of this paragraph and in addition denies that the will could be originally probated in British Columbia, and, as there is no claim that the property in California was distributed or affected by the probate proceedings in British Columbia, the defendant cannot base the collection of the tax upon these proceedings.

Why is it necessary that the collection of the tax must be based upon these probate proceedings in the Superior Court of the City and County of San Francisco? For the reason that neither the Collector of Internal Revenue nor the District Court of the United States has any probate powers. See the case of *McCoy vs. Gill*, 156 Fed. Rep., p. 985, to which case we shall have occasion later to refer more fully, where the Court said:

“Only by probate is a writing in its nature testamentary established in Massachusetts as the will of its maker. The Circuit Court of the United States is not a court of probate and is without jurisdiction to determine that a writing which for any reason has failed of probate in the proper state court is the last will of Jordan.”

Without these probate proceedings it cannot be ascertained to whom his property shall go or whether

Alexander Dunsmuir, deceased, left a will or died intestate, for, although he left a document purporting to be a will that document may be invalid as such, and, until the probate court has determined that fact, it cannot be known whether he died testate or intestate or to whom his property shall go.

This being so, if the defendant be allowed to attack these probate proceedings on the ground that the Court had no jurisdiction, there would be absolutely nothing upon which to base the collection of the tax sued for in this case and the same would have to be returned to plaintiff.

If the defendant is willing to accept these probate proceedings for the purpose of showing that certain property was distributed to James Dunsmuir so that the United States may collect a tax thereon, he must accept them in toto. The defendant cannot say that he will accept the proceedings as a determination that Alexander Dunsmuir, deceased, died testate and left a will, under the provisions of which certain property is given to James Dunsmuir, and, at the same time, say, as to another question decided by the Court, that is: that the deceased was domiciled in British Columbia at the time of his death (which finding was necessary in order that the Court might have jurisdiction), that he will not accept such finding but will contend that the probate court had absolutely no jurisdiction in the matter. The defendant cannot accept the probate proceedings for one purpose and reject them for another. If he relies upon them for the collection of the tax, as he

must do, he must accept them as being good and valid proceedings had within the jurisdiction of the Court.

The above mentioned case of *McCoy vs. Gill*, 156 Fed. Rep., p. 985, decided by the Circuit Court of the United States for the First Circuit (District of Massachusetts) is, we think, decisive of this point for which we are contending. And it is the only decision we have been able to find upon the question, either one way or the other. That case was brought to recover from the United States Collector of Internal Revenue a legacy tax levied under the War Revenue Act of June 13th, 1898, and paid under protest. The decedent's name, which was Jordan, died on September 29th, 1898, leaving a document purporting to be a will. This document was offered for probate to the Probate Court of Massachusetts, which Court admitted the document to probate. Subsequently on appeal the Supreme Court of the State of Massachusetts set aside the order admitting the will to probate. Thereafter pursuant to the statutes of the State of Massachusetts a compromise was entered into between the different parties interested in the estate whereby the estate was distributed in a manner other than that provided in the document purporting to be the decedent's will. The Collector of Internal Revenue contended that a legacy tax must be paid based upon the provisions made in the purported will, which tax amounted to \$3,060.67, the legatees contending that the tax should be based upon the property distributed to them in accordance

with the compromise which amounted to \$1,781.25. The legatees having paid the amount demanded by the Collector under protest, brought suit to recover the difference amounting to \$1,279.42. The Circuit Court of the United States held that the Government of the United States must rely upon the decree of distribution in order to collect the tax at all and that, therefore, it must accept that decree as final and could not attempt to go behind it and collect the tax according to the provisions of the will and that by reason thereof the plaintiffs were entitled to recover. As this case is so conclusive of our position that the probate proceedings must be accepted by defendant, we desire to quote in full what the Court says upon this question. It is as follows:

“The government contends that the tax should be assessed according to the tenor of the writing offered for probate, on the ground that this is the will of Jordan, rather than the compromise subsequently effected by those interested in his estate. But, whether the compromise be deemed a will or not in the purview of the war revenue act under no circumstances can a writing which has not been admitted to probate in the proper court of Massachusetts be made the basis of an inheritance tax in the federal courts. Only by probate is a writing in its nature testamentary established in Massachusetts as the will of its maker. The Circuit Court of the United States is not a court of probate, and is without jurisdiction to determine that a writing which for any reason has failed of probate in the proper state court is the last will of Jordan. Either

the compromise is to be deemed his will within the purview of the war revenue act, or he must be deemed to have died intestate. This was the view necessarily taken by the government itself. In collecting the tax the government necessarily set up the compromise. It did not seek payment from the persons named as executors in the original writing. They never had in charge any distributive shares of personal property. It sought payment from the persons appointed executors by the probate court by virtue of the compromise, inasmuch as the latter made distribution of Jordan's estate. A writing, which may have been in Jordan's possession, does not become his will merely because it has been vainly offered for probate. There is some difficulty, indeed, in holding that a compromise which has been made by the parties to the controversy, and has been approved by the supreme court of probate, is thereby made the will of Jordan. Unless, however, the shares distributed in accordance with its provisions be deemed for the purpose of the war revenue act to pass 'by will or by the intestate laws,' the United States can collect no tax whatsoever upon the shares. This result seems inadmissible."

## SECOND POINT.

Assuming, only for the sake of argument, that the above mentioned decree of distribution is not conclusive, there is no evidence to support the finding of the District Court that Alexander Dunsmuir, deceased, was not domiciled in British Columbia at the time of his death. It is alleged in paragraph 3 of

the complaint (transcript, page 2) that said Alexander Dunsmuir, deceased, was born in British Columbia, which allegation is admitted by the answer. It is alleged in paragraph 12 of the complaint (transcript, page 7) that said deceased was at all times a British subject. This allegation is denied in the answer, but it was admitted by the defendant at the trial, as shown by the bill of exceptions (transcript, pages 94-95), that said deceased was at all times a British subject. It is also admitted that Alexander Dunsmuir, deceased, was at all times, except at the time of his death, domiciled in British Columbia, as the allegations of paragraph 3 of the complaint (transcript, page 2) to the effect that British Columbia was at all times the domicile of said deceased are admitted by the answer except that defendant denies that the domicile was such at the time of his death. (Transcript, page 13.) It is conceded, therefore, that said Alexander Dunsmuir, deceased, was at all times a British subject and was born in British Columbia, and that his domicile was at all times, except at the time of his death, in British Columbia. His domicile of origin being British Columbia, such domicile is presumed to continue until it is shown that he acquired another domicile, the burden of showing which is upon the party who asserts the change of domicile, in this case such party being the defendant. This should be especially true where the defendant has admitted that the domicile was British Columbia at all times except at the time of death. In order to effect a change of domicile it is not suffi-



cient to show that a person, leaving the domicile of origin, resided elsewhere. In addition to such fact it must be shown that he left the domicile of origin with the intention of taking up a new domicile. See the following quotations from the admirable work on the law of domicile by Mr. Jacobs:

“Section 109. The British and American authorities attach great importance and peculiar qualities to domicil of origin, and lay down with respect to it two principles, which have passed into maxims, namely,

“(1) Domicil of origin clings closely; and

“(2) Domicil of origin reverts easily. Both of these principles are universally received in Great Britain and America.”

“Section 114. Every man’s domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon him who asserts the change.”

Also see volume 14 of Cyc., pages 851-852, where it is said:

“A domicil of origin is retained until changed by acquiring another. So each successive domicil of choice continues until another is obtained and the acquisition of a new domicil at the same instant terminates the preceding one.

“The acquisition of the new domicil must have been completely perfected and hence there must have been a concurrence both of the *factum* of removal and the *animus* to remain in the new

locality before the former domicile can be considered lost.”

See also the case of *Hascall vs. Hafford*, 107 Tenn. 355, (89 Am. St. Rep. 952). In this last case it is held that “In order to be a resident of a place, the “person must have acquired a domicile there; and “to constitute domicile there must be a residence and “an intention of the person to make the place where “he resides his home.” At page 362 of the opinion in this case it is said:

“The principal facts relied on to show that deceased had acquired a domicile in this state are 1. that he lived here for several years; and 2. that he once voted in a primary election; and 3. that he was once elected alderman of the town of Gates. It should be stated, however, that he refused to accept the office of alderman and declined to serve. But we think the declarations of deceased in respect of his home and his intention to return to it outweigh the fact of voting in a primary or running for office, as indicating the real purpose of the party. It was held in *Divine v. Dennis*, 1 Shannon’s Tenn. Cas. 378, that facts indicating that a party was a permanent citizen of Tennessee—such as voting in our elections, suing and being sued in our courts, paying taxes, and renting land, etc.—are overcome by his repeated declarations that he was a citizen of Kentucky, and of his purpose to return to that state when his government contract was finished, etc.”

Now let us look at the evidence to see what, if any,

evidence there is to show that Alexander Dunsmuir, deceased, changed his domicile from British Columbia to the State of California or that his domicile ever was in the State of California. The testimony in regard to the question of domicile is in substance as follows:

### TESTIMONY FOR PLAINTIFF.

There was first admitted in evidence the above mentioned decree of distribution (transcript, pages 32-42), which finds as above stated (transcript, page 34), that Alexander Dunsmuir was at the time of his death a British subject and a resident of and domiciled at Victoria, Province of British Columbia, but temporarily residing in the City and County of San Francisco, State of California.

Mountford S. Wilson testified (transcript, pages 43-44) in substance as follows: I am an attorney at law and knew Alexander Dunsmuir for about ten years before he died. Alexander Dunsmuir was a resident of British Columbia. The bulk of the Dunsmuir business consisted of coal mines and large tracts of land in British Columbia. Their business down here in San Francisco was merely a sales agency for their coal and a branch of their business. Alexander Dunsmuir was the manager of the business here in San Francisco, and spent the greater part of his time in this state. I think his rooms were mostly in the Pacific Union Club. During the latter part of his life he bought a place, something like 50 or 100 acres, at San Leandro and built a house on the property

costing about \$30,000 or \$40,000. This place was bought and the house built for a Mrs. Wallace, who subsequently became his wife just before his death. He gave this property to her and built the house for her. The title to the whole property was taken in her name. She was not his wife at the time of the conveyance. They were living together many years before they were married. He married her six weeks before he died.

Walter A. Gompertz testified (transcript, pages 47 and 50-56) in substance as follows: I know James Dunsmuir, the plaintiff in this action. I have had business connections with him. I was employed in the business here in San Francisco. I knew Alexander Dunsmuir for about ten years. He was a resident of British Columbia at the time of his death. I know that because he told me so. He told me so in this way—that he wanted his name put in the directory as president of R. Dunsmuir's Sons Company of San Francisco, residing in Victoria, British Columbia. And his name was put in the directory in that way. I only remember having one conversation with him in regard to putting his name in the directory. I think the conversation was in the year 1896 at the time of the incorporation of the company. Before the incorporation the business was an unincorporated association conducted under the name of R. Dunsmuir & Sons. Alexander Dunsmuir's mother was the firm of R. Dunsmuir's & Sons. The parent business was in Victoria but was unincorporated. Alexander Dunsmuir and his brother made arrangements with

their mother whereby they incorporated the San Francisco business. The ancestral residence was in Victoria. He was not here in San Francisco most of the time. He was here off and on. He lived at the Pacific Union Club for awhile but he was in Victoria the greatest part of the time. He went east a good many times also. He was here for two or three months or six months and then he would go away. And he went to Europe for a year. He was very fond of hunting and fishing and would go away on those trips up north a great deal. Alexander Dunsmuir had very large interests in railways and coal mines in British Columbia. He was also interested in the R. Dunsmuir Sons Company of San Francisco. The nature of the business of that company was the handling of the products of the mines of the Wellington Colliery Company. The business here was merely a sales agency of the mines in British Columbia. All of Alexander Dunsmuir's property was in British Columbia. Alexander Dunsmuir told me when he spoke about putting his name in the directory that he was a British subject and resided at Victoria. I visited Alexander Dunsmuir at the places where he stopped here in San Francisco. That is the Pacific Union Club, the Grand Hotel and the Occidental Hotel. I think he had four rooms in the Grand Hotel. I do not know how many rooms he had at the Occidental, but he had more than one.

The directories of the City and County of San Francisco for the following years were admitted in evidence, which directories recite as follows:

The directories for the years 1882-1891, both inclusive, state the residence of Alexander Dunsmuir as being "Pacific Union Club, San Francisco."

The directory for the year 1892 states the residence of Alexander Dunsmuir as being "Victoria, British Columbia." The directories for the years 1894 and 1895 state the residence of Alexander Dunsmuir as being "Bohemia Club." The directory for the year 1896 states the residence of Alexander Dunsmuir as being "Victoria, British Columbia." The directories for each of the years 1897, 1898 and 1899 show the following entry: "Alexander Dunsmuir, President R. Dunsmuir Sons Co., 340 Steuart Street, R. Victoria, B. C."

Peter W. Bellingall testified (transcript, pages 75-78) in substance as follows: I knew Alexander Dunsmuir in his lifetime. I knew him when he came down from Victoria with his father as a boy. The first time he came on a visit. When he came down on business he came to supersede Mr. Berryman, who had been the agent for the Wellington coal. Alexander Dunsmuir told me that he was a subject of British Columbia, and that he was not a resident of San Francisco, but that he resided with his father in Victoria. His father was living I believe at that time. That was upwards of twenty years ago. In San Francisco Alexander Dunsmuir generally lived in hotels. He had a country place at San Leandro but I do not think he stayed there much. I live in Oakland and I think I met him on the boat only three or four times. He never could

go on bonds in connection with Custom House matters because he was a British subject.

William Greer Harrison testified (transcript, pages 82-85) in substance as follows: I have resided in San Francisco for about 39 years. I knew Alexander Dunsmuir in his lifetime and I knew him for about twenty years. He was representing here in San Francisco a coal firm, his people's firm. I have had frequent conversations with Alexander Dunsmuir in regard to his residence. In conversation he always referred to British Columbia as his home. He was always proud of being a British subject and did not care for American institutions. He would always insist that he would not give up his citizenship, that he was a Canadian and would remain a Canadian. My connections with Dunsmuir were business and social. I met him nearly every day. He belonged to the British Benevolent Society. The conversations I have mentioned were primarily directed at citizenship, the difference between British citizenship as compared with American. Although he was fond of California he did not like to live here and always insisted that he was here because he had to be here to represent his firm in British Columbia.

J. E. Freeman testified (transcript, pages 85-87) in substance as follows: I am an architect and have resided in San Francisco since 1887. I knew Alexander Dunsmuir and had business relations with him. I was employed by him in 1898 to build a residence for Mrs. Wallace, at San Leandro. In the course of my relations with him I had a conversation with

him in regard to his residence. In speaking about the different nationalities becoming American citizens I said that, among my business acquaintances a great many of whom were Englishmen, while they had business dealings in San Francisco and resided here they never became American citizens. During the course of that conversation he stated that he was an Englishman and his residence was in Victoria. He stated also that his home was Victoria. I called on him when he was living at the Grand Hotel. He had several rooms there. I do not know how much time each year he spent in San Francisco. I can only speak of the time I had business relations with him in the building of the house. He was living in the old house at San Leandro. The contracts for the construction of that house were made out in the name of Mrs. Wallace. He told me to make out the certificates in her name and that Dunsmuirs & Sons acting as her agents would pay the bills and they did so.

J. Homer Fritch testified (pages 88-92) in substance as follows: I have resided in San Francisco for 57 years. I knew Alexander Dunsmuir for 30 years and I had a great many dealings with him. His family and my family were very intimate. We had a great many conversations about American and Englishmen. According to his idea an American could not compare with an Englishman. He was essentially British. I remember once about his speaking of home, that was about 1895 or 1896. I had been up to Victoria with John Talbot on a hunting trip. The



following year Alexander Dunsmuir wanted me to join a party and go with him. He came to see me at the office and said "I am going up home on a " hunting and fishing trip. I want you to go, you " and Talbot." Always in conversation he spoke of Victoria as his home. He claimed that his home was with his mother in what was called the Dunsmuir Castle in Victoria. I met him also in Victoria on my way down from a hunting trip and he said "I want you to go out home and see mother and the family." The last conversation I had with Alexander Dunsmuir in which he referred to Victoria as his home was in 1895 or 1896 when he stated that he was going home to Victoria. I visited him at the Grand Hotel. He never referred to San Leandro as his home or to his rooms as his home. It is pretty hard to say how much time he spent each year in San Francisco. His main business was in Victoria. He was interested with his brother there and was an official in a number of companies there. He was either president or vice-president of the Esquimalt Railway in Victoria. The main business at Victoria was conducted under the name of R. Dunsmuir & Sons. The San Francisco business was conducted under the name of R. Dunsmuir Sons Company, a California corporation. His active interest was not here in San Francisco. Alexander Dunsmuir originally came down here to San Francisco about 1875 or 1876 to investigate the accounts of Mr. Berryman, who had the agency for the Dunsmuir coal. In about a year or so Berryman had to turn over the San Francisco business to the

Dunsmuir. Alexander Dunsmuir came down and took charge of that. First he put a nephew of Mr. Berryman's in charge of the business here and later a man named Jewett. Alexander Dunsmuir was never what you would call an active member of the business here; he was a kind of an overseer. He kept largely between the two points, Victoria and San Francisco. **He stayed here a great deal of the time.**

Walter S. Thorne testified (transcript, pages 92-94) in substance as follows: I am a physician. I knew Alexander Dunsmuir slightly for three or four years and intimately for two years just prior to his death. I have had conversations with him respecting his residence in Victoria. The last incident of that sort that I recall was just prior to their removing to San Leandro, about a month prior to the completion of the house which was I think completed in December, 1899. I said to him, "Now you are going to have a nice home over there why don't you become an American citizen, behave yourself like an American, you are going to live here." He said, "You are quite mistaken. I am not going to live here, this is not my home and this house is not intended to be my home. I am building this for Mrs. Wallace"—whom he had not married at that time. He said, "under no condition would I become an American." Upon further questioning him I learned that he had a provincial or national prejudice against American citizenship. We talked along these lines. He was very positive about it. He said, "My home and my people are in Victoria and I don't purpose to live here and become

“a citizen.” That conversation is very distinctly impressed upon my memory because of the coincident relation of that house building and my saying to him, “Well, now you are going to live here why don’t you become an American citizen-” and his strenuous and positive denial of any such intention.

Thomas P. H. Whitelaw testified (transcript, pages 94-95) in substance as follows: I knew Alexander Dunsmuir. I have had business dealings with him. I have often been with him in Victoria, stopped with him at the Driard House, a hotel in Victoria. He always kept his rooms there when he was in San Francisco. I have seen him a great many times in Victoria. The last time was in 1887 or 1888. I visited his mother’s house in Victoria. Four times I went with Mr. Dunsmuir to what was called the Dunsmuir Castle in Victoria. He had rooms at the Driard House in Victoria and also at his mother’s house. He had two rooms at the Driard House. I visited him at the Occidental Hotel. He had two rooms there when in San Francisco. I don’t think he kept his rooms here in San Francisco when he went to Victoria, but he always kept his rooms at the Driard House. He told me that himself. He spent more than three or four months of the year up in Victoria. He did not spend the greater part of each year in San Francisco. The greater part of his time was spent in British Columbia. I do not think he went hunting much.

W. E. Mighell testified (transcript, pages 95-98) in substance as follows: I knew Alexander Dunsmuir

intimately in his lifetime. I was partner with him in ships. I have had business relations with him. I had a conversation with him in regard to where his residence or home was. The conversation opened about his buying some stock in the California Shipping Company which I started and it drifted on to his residence and I asked him why he had not become naturalized. He said that there was nothing in it, that his residence was in British Columbia, all his interests were there, that he owned an interest in the Wellington Collieries, the Esquimalt Railway, and was interested in Victoria and on the Island of Vancouver. He said he represented the firm of R. Dunsmuir & Sons here in San Francisco. The last conversation I had with him in relation to his residence was the afternoon before he was married. We were on the Oakland Ferry, going from San Francisco to Oakland, and, if I remember right, there was an American ship flying an American ensign that we passed as we went over. I said "Alex, that is the flag you ought to live under," and he said "Oh, no; the flag I am under suits me, the English flag." "Well," I said, "why don't you become naturalized, become an American?" "Your business is here." "Well," he says, "Bill, there is nothing to it; I would prefer to remain under the English flag, where all my interests are." At that time he also mentioned that his residence was Victoria, British Columbia. I knew he lived there. I have visited him at his office there and have seen his brother there and his family. Mr. Dunsmuir did not take stock in this California Shipping Company. He gave

me as a reason for not doing so that he did not care to have anything that was under the American flag.

There was admitted in evidence a page from the register of the Hotel Imperial of New York, which page is set forth at pages 100-102 of the transcript. The following entry appears on said page of the register of the Hotel Imperial (transcript, page 101), which entry is in the handwriting of Alexander Dunsmuir, deceased: "Alex. Dunsmuir, wife & maid, Victoria, B. C."

#### TESTIMONY FOR DEFENDANT.

There was admitted in evidence the above mentioned Articles of Incorporation of R. Dunsmuir Sons Company (transcript, pages 104-109), which articles are dated February 27th, 1896, are signed and acknowledged by Alexander Dunsmuir, and recite (transcript, page 105) the residence of Alexander Dunsmuir as being "San Francisco, California."

There was admitted in evidence the above mentioned will of Alexander Dunsmuir (transcript, page 110), which will is dated December 21st, 1899, is signed by him and recites as follows: "I, Alexander Dunsmuir, of San Francisco, California, United States of America, hereby revoke," etc.

There was admitted in evidence the marriage license of Alexander Dunsmuir and Josephine Wallace (transcript, page 113), which is dated December 19th, 1899, and recites that Alexander Dunsmuir is a resident of Alameda County.

Joseph Herrscher testified (transcript, pages 115-117) in substance as follows: I am in the general merchandise business in San Francisco and San Leandro. I knew Alexander Dunsmuir in his lifetime. I have talked with him about California at various times. He told me he was going to make his home in California; that he made his home there. He never dwelt upon San Francisco, only San Leandro. I recollect various conversations I had with him. I was city treasurer at that time and also a member of the board of education and he took quite a liking to me in talking matters over, and in delivering meats. He was a very peculiar man; he did not want everybody going in his premises and any orders given at the store at that time he wanted me to deliver them personally. At that time he spoke of making his home in California and liking the country here. He never told me where he had resided prior to going to San Leandro. He never went into any details about his whereabouts. He only conversed in reference to the climate and the country and the surroundings. He did not tell me he intended to make his home in San Leandro. He said he had made his home there, he was going to stay there, and that he liked it. I don't know that this property belonged to Mrs. Wallace; he always mentioned it as his. I do know that she had an interest in it. I do not know the details of the estate at all. I am just explaining to you what Mr. Dunsmuir told me himself. I did not know that this was not his home in the sense that it did not belong to him. He

never told me anything about that. I do not know when Mr. Dunsmuir was married, but it must have been in 1889. I could not say whether he told me this before or after he was married. I know the lady was living up there; I had conversations with her and she gave me orders. I called her Mrs. Dunsmuir. I cannot tell exactly the date or month when I first called her Mrs. Dunsmuir, but I know it was in 1889. I do not remember when they were married. I think they bought the place up there in 1889. I mean 1899, I made a mistake in the year. I don't think the house was completed during the time I saw him; I think it was in course of construction. I think he did live in that large house. I went there myself with the wagon. That was not after his death. I was there after he died, but I recollect the time he was living in the house. I cannot say whether or not he was living in the old house when the place was bought for Mrs. Wallace. I saw him in the new house several times. The first time I met him I drove up to the place to get orders and I met him at the gate. I asked him if he was Mr. Dunsmuir and he said yes. Then we talked over matters and got acquainted. He told me this was the only country he liked. He did not say he was going to make his home there. But he said "I have bought this place and this is my home." I don't know what brought out that conversation. I have no interest in this matter at all. I am here telling just what the man told me. I went up there once or twice a week for orders for groceries and general merchandise. He was not very pleasant

when I approached him first, but when we got acquainted and he knew my standing in the community we were friends. I do not remember when Alexander Dunsmuir was married. I knew, however, that he was married. He told me to see his wife about the orders. He told me that in 1899, about six or seven months before he died. I remember seeing an account of the marriage in the papers.

There was admitted in evidence an entry in the register of marriages of the Church of the Advent in Oakland, dated December 21st, 1899, as to the marriage of Alexander Dunsmuir and Josephine Wallace (transcript, pages 118-119), in which it is recited that the residence of each is San Leandro.

James P. Taylor testified (transcript, pages 119-122) in substance as follows:

I knew Alexander Dunsmuir in his lifetime. I was one of the witnesses at his marriage. I first became acquainted with him about 1877 or 1878. I had business relations with him here in San Francisco commencing in 1878. From that time my acquaintance with him was intimate. I called upon him at the Occidental and Grand Hotels and also at San Leandro. The place at San Leandro was bought in Mrs. Wallace's name. They lived over there before they built the new house. I don't think they ever lived in the new house. It was not completed. There were times when he was traveling in Europe and at other times I should say he lived here in San Francisco about three-quarters of the year. He went away on trips and on his trips north he would spend a good



deal of time hunting. At times he stated to me that his home was in Victoria. I do not remember at how late a date he said this. I do not recollect that he every said anything about intending to go to Victoria and stay there permanently. I should say that his active business interests were here in San Francisco, that is: those that he had to look after personally. He had a regular business manager here during all the time that he was here. The only way in which he spoke of San Leandro as his residence was when I used to come over to San Francisco and frequently go back on the boat with him and then take the train and sometimes go out to spend the evening and night with him, he would say in the office, "Well, James, let us go home." He said it in that colloquial or general way. After this invitation I would go with him to San Leandro. After he and Mrs. Wallace were married they only lived at San Leandro until the next day, when they left for New York. I may have testified before the British Consul on a commission issued by the Superior Court of the Province of British Columbia in the case of Hopper against Dunsmuir that Alexander Dunsmuir always told me that his residence was Victoria. I cannot recollect at this time. I made the affidavit upon which the marriage license of Alexander Dunsmuir and Mrs. Wallace was obtained. In that affidavit I stated that he was a native of British Columbia and a resident of Alameda County. Mr. Dunsmuir requested me to go and procure this marriage license for him, and told me to take such steps as were necessary to secure the

license. In that connection I took it that he was a resident of San Leandro. I do not remember now whether he gave me any special authorization on that point or instructions on that matter. I cannot say, so far as my memory goes, that I had any special instructions to put in the affidavit that his residence was Alameda County. I do not know that I knew at that time that he regarded Victoria as his home.

Obadiah Rich testified (transcript, page 122) in substance as follows: During the years 1885 to 1890 I was manager of the Grand Hotel. Alexander Duns-muir lived there part of that time. He was there from time to time but did not keep his rooms there permanently. He had three rooms.

P. M. Nevin testified (transcript, pages 122-124) in substance as follows: I knew Alexander Duns-muir. I knew him in San Francisco and San Leandro. I was employed by him in both places. I went to work for him in San Francisco in 1893 as a teamster in the business. The only place I ever knew of him living at was the Occidental. I heard he was living there. I knew he was at the Grand. I did not take particular notice as to how much time of each year he would spend at San Francisco. Every once in a while I would see him and then he would go away and then I would not see him for two or three months or six months. I worked at the place at San Leandro. I worked there first in the capacity of coachman. I went over there on March 12th, 1899, and I stayed there through his lifetime. I never heard him make any statement as to where his home

was. I never heard him speak of San Leandro as his home, except that when I would take him to the train he would tell me he would be home on such and such a train, telling me what train he would be home on. I remember when he married Mrs. Wallace. He never lived at the new house. I was there all the time while the house was being constructed. The new house was not completed when they were married. It was not fit for occupancy until after Mrs. Dunsmuir came home. The next day after their marriage they went to New York. They did not come back to San Leandro at all after they were married. They remained in Oakland that night and went to New York the next day, I understand.

The foregoing is, we believe, a fair summary of the evidence as to the domicile of Alexander Dunsmuir, deceased. And where, we ask, is there any substantial evidence that said deceased changed his domicile from British Columbia or that he was ever domiciled in the State of California? It is respectfully submitted that there is none and that the judgment in favor of the defendant is erroneous and must be reversed. We believe that the mistake in giving judgment in favor of the defendant instead of the plaintiff arose by reason of the fact that the case was treated as if the plaintiff were attempting to establish for Alexander Dunsmuir a new domicile in British Columbia different from one that he had previously had in California. If such were the case, it might properly be said that we had failed to show such new domicile. But such is not the case.

As above stated, it is conceded at the outset that Alexander Dunsmuir, deceased, was born in British Columbia, and was at all times a British subject and was at all times, except at the time of his death, domiciled in British Columbia. We have, therefore, a domicile already established. Not California, however, but British Columbia. The defendant, asserting that the domicile at the time of death was California, must show the change of domicile. This he has signally failed to do.

The evidence shows that Alexander Dunsmuir originally came down from Victoria, British Columbia, to San Francisco, California, to investigate the accounts of the San Francisco agent of his father's coal business, which was in British Columbia. Later he came to San Francisco to take charge of the business, which was a mere selling agency. The evidence shows also that he had large property interests all of which were in British Columbia. He always insisted that British citizenship was far superior to American and that he would never become an American citizen. He always stated that his residence was Victoria, British Columbia. He never claimed that his residence was in California. He referred to Victoria as his home. He was in San Francisco merely to look after the business here. He had rooms in his mother's house in Victoria and also had rooms in the Driard House in Victoria, which rooms he kept even when he was here in San Francisco. Although he spent considerable of his time in San Francisco he spent considerable of his time in Victoria also, keeping largely

between the two places, except when he was traveling in Europe or elsewhere. The city directories of San Francisco, California, for the years 1896, 1897, 1898 and 1899, the last four years of his life, show his residence as being Victoria, British Columbia. About the year 1896 when the R. Dunsmuir's Sons Company was incorporated he instructed one of his employees, Mr. Walter A. Gompertz, to have his name put in the directory as president of said company and as residing at Victoria. And, finally, we have the entry "Alex. Dunsmuir, wife & maid, Victoria, B. C.," made by Alexander Dunsmuir in the register of the Hotel Imperial, New York, on December 26th, 1899 (one month and five days prior to his death), which entry is the last declaration by him as to his domicile and is in fact the only written declaration in his own handwriting in the record. This entry, without the other evidence in the record, shows conclusively that Alexander Dunsmuir never claimed domicile or residence in California, but intended to retain his domicile in British Columbia. As he had no intention of making his domicile in California, his domicile was not changed from British Columbia to California by reason of the fact that he was here a considerable portion of the time. (See the above quotations from Cyc. and Jacobs' Law of Domicil, and the above mentioned case of *Hascall vs. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.)

Of course, there is the recital in the Articles of Incorporation that Alexander Dunsmuir resided at San Francisco, California, and the recital in the will,

"I, Alexander Dunsmuir of San Francisco, California," but these recitals are entitled to no weight whatever in our case for a number of reasons. In the first place neither of these documents is shown to be in the handwriting of Alexander Dunsmuir, he merely having signed them, while the above mentioned entry in the register of the Hotel Imperial made at a later date, is entirely in his own handwriting. Furthermore, there was no evidence that these recitals in the will and articles of incorporation were ever called to his attention. These documents were undoubtedly prepared by a lawyer, and he, as a person would do under similar circumstances, described Alexander Dunsmuir as being of San Francisco, California, the place where he was at the time the same were executed. There is no testimony to the effect that Alexander Dunsmuir ever told the attorney who drew the will that he resided in San Francisco and there is no evidence that he ever told the attorney who drew the Articles of Incorporation that his residence was San Francisco. In addition, the words in the will "of San Francisco, California," are not the equivalent of a statement that that city was the place of residence of Alexander Dunsmuir. The San Francisco directory for the year 1896, the year in which the Articles of Incorporation were executed, recites that Alexander Dunsmuir's residence was Victoria, British Columbia, as do the subsequent directories during his lifetime. If the facts in this case were quite evenly balanced as to whether Alexander Dunsmuir was a resident of British Columbia

or of San Francisco these recitals in the will and Articles of Incorporation might have considerable weight, but, where the remaining evidence is all one way, that is: that the domicile of Alexander Duns-muir was in British Columbia, these recitals are entitled to no weight whatsoever.

See Section 463 of Jacobs' Law of Domicil, which reads as follows:

"But although such recitals (referring to the recitals of residence in deeds and wills) are important either when standing by themselves or when corroborating other evidence, particularly in a nicely balanced case, they are by no means controlling when contradicted by other facts and circumstances.

"They are frequently made in both deeds and wills without any special importance being attached to them; and sometimes are introduced by scribes without the attention of the grantor or testator being particularly called to them. Great caution should therefore be used against giving them too great weight, or attaching to them a meaning which was not intended. Said Surrogate Bradford, in a learned opinion in *Isham v. Gibbons* (1 Bradf. 69): 'The declarations of the deceased in his will and in the deed of manumission furnish the only evidence pointing to the acquisition of a new domicil. In a nicely balanced case they might be decisive; but great caution should be used in not giving them to great weight, or attaching to them a meaning not designed by the testator. \* \* \* The truth is, after all, that such written declarations, even of the most solemn character, are but facts

to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At the best, the *animus* of the party is only to be inferred from them. In this respect they are like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention.' ”

Furthermore, this recital in the will cannot be used to show that Alexander Dunsmuir was domiciled in California as the finding in said decree of distribution is directly to the contrary. The will being under the law merged in the decree the recitals in the decree control the recitals in the will. See the following cases:

*Goad vs. Montgomery*, 119 Cal. 558;  
*Estate of Trescony*, 119 Cal. 568;  
*Estate of Larned*, 156 Cal. 309;  
*Jewell vs. Pierce*, 120 Cal. 79.

We also have the marriage license and the entry in the church register, both of which were objected to by us and neither of which should have been admitted by the Court as James P. Taylor, witness for defendant, testified that he made the affidavit upon which the marriage license was issued and that he had no instructions from Alexander Dunsmuir to state that his residence was Alameda County or any instructions whatsoever in regard to his residence, and, as the entry in the church registry was not a public record and furthermore it was not shown that



the person making the entry had any knowledge of the facts therein stated. They were undoubtedly taken from the marriage license. The statement in the marriage entry was hearsay pure and simple.

In addition, we have the testimony of the witnesses Joseph Herrscher, James P. Taylor, Obadiah Rich and P. M. Nevin, which, with the will, articles of incorporation, marriage license and church registry, completes the defendant's evidence. Rich simply testified that during part of the time between the years 1885 to 1890 Alexander Dunsmuir lived at the Grand Hotel but that he did not keep his rooms there permanently. Nevin, who was a coachman for Alexander Dunsmuir at San Leandro, testified that he never heard him speak of San Leandro as his home, except that when Nevin drove him to the station in the morning Alexander Dunsmuir would tell him what train he would be home on. Nevin also testified that he worked for Alexander Dunsmuir as a teamster in the San Francisco business. He did not know how much of each year Alexander Dunsmuir spent in San Francisco, except that he would see him every once in a while and then Dunsmuir would go away and he would not see him for two or three or six months. Taylor testified that Alexander Dunsmuir at times referred to his home as Victoria but Taylor did not claim that he had ever referred to San Francisco as his home. Taylor further testified that Dunsmuir never referred to San Leandro as his residence except that sometimes in the office when Dunsmuir would invite him out to San Leandro to

spend the night he would say: "Well, James, let us go home." Herrscher did testify that Alexander Dunsmuir told him that he made his home in California; also that he made his home in San Leandro. That he was going to stay there and that he liked it. Very little faith, however, can be put in this testimony. Herrscher, in common with the rest of defendant's witnesses, except Taylor, was not a personal friend of Alexander Dunsmuir, while nearly all of the plaintiff's witnesses were. Herrscher was a tradesman, and a very conceited one, as his testimony shows, who took and delivered orders at the San Leandro house. It seems unnatural that Alexander Dunsmuir should discuss his personal affairs with a tradesman, whom he had only met in the way of trade. Especially so that he should, the first time the man came to the house, say to him: "I have bought this place and this is my home." These statements of Alexander Dunsmuir, testified to by Herrscher, if they are to be considered as declarations by him that his residence or domicile was in San Leandro, are little short of remarkable as they are exactly contrary to the statements made by him to his personal friends. One, for example, being the statement made to Dr. Thorne about two months before he died that the San Leandro place was not his home and that he was building it for Mrs. Wallace, whom he had not married at that time. But these statements were not, and undoubtedly were not intended by Alexander Dunsmuir, to be declarations as to his place of domicile or residence. It is appar-

rent from Herrscher's testimony that he and Alexander Dunsmuir were not discussing the latter's domicile or place of residence. He was not discussing, and it was not likely that he would discuss, his personal affairs with Herrscher. Herrscher, himself, says that Dunsmuir did not tell him where he had formerly resided or go into any details as to his former whereabouts. They only conversed in reference to the climate, the country and the surroundings. If Dunsmuir made the statements attributed to him by Herrscher, they were probably made in answer to inquiries of Herrscher. It is not likely that Dunsmuir would say to Herrscher, as he did to his personal friends, that he was an Englishman and was here only to look after the San Francisco agency of his firm's coal business, and, while he was then living in San Leandro, Victoria was his residence. It was sufficient for him to say to Herrscher, his tradesman, that he liked San Leandro and it was his home. There was no occasion for him to say that he intended to return to Victoria, no matter how strong that intention was. It is apparent, therefore, that Herrscher's testimony even if it were true can have no weight in determining the domicile of Alexander Dunsmuir. But it is inherently improbable and there are certain discrepancies in it which make it difficult of belief. Herrscher says Alexander Dunsmuir and Mrs. Wallace lived in the new house when the testimony is clear to the effect that they did not do so, as the new house was not completed at the time of the marriage, Nevin, the coachman, testifying that

they went to Oakland after the wedding and did not return at all to San Leandro. Herrscher further says that he began calling Mrs. Wallace "Mrs. Dunsmuir" during Alexander Dunsmuir's lifetime, which was impossible as they did not, as above stated, return to San Leandro after the marriage. But in any event, the statements made by Alexander Dunsmuir to Herrscher, as well as the statements made to Taylor and Nevin, that he would be home on such and such a train and "Let us go home," are, in view of the other evidence in the case, entitled to no weight on the question of domicile. See Section 71 of Jacobs' Law of Domicil, reading as follows:

"There are several objections, however to affirming the entire and universal equivalency of 'domicil' and 'home': First: Because, while the former is a word of at least approximately precise meaning, the latter is used in various significations; for example, (a) with reference to a temporary abiding-place, as when one speaks of 'going home' to his lodgings—and this certainly is not domicil."

After this review of the evidence we believe this Court will unqualifiedly agree with us that there is no evidence to justify the District Court in its conclusion that Alexander Dunsmuir was not domiciled in British Columbia at the time of his death. His domicile was originally there, he was only here temporarily as he himself on numerous occasions declared, he always declared that his residence was in Victoria, he never declared his intention of changing

his domicile from British Columbia to the State of California, or anywhere else, he never did anything to show that he intended making a change of domicile, and, finally, he declared in a statement in writing, to-wit: the entry on the register of the Hotel Imperial, about a month before his death, that his domicile was still in British Columbia.

We might not be justified in an ordinary case, where the evidence is more or less conflicting, to ask this court to review the evidence where there are no findings, even though without findings it be known exactly what the trial Court had found, yet we feel that in this case, where there is really no substantial evidence to justify the finding of the trial Court that Alexander Dunsmuir was not domiciled in British Columbia and where it would, we respectfully submit, be unjust to affirm the judgment of the trial court, and where findings are not necessary to know exactly what the trial court found, this Court should examine the evidence.

### THIRD POINT.

The trial Court could not find that the legacy to James Dunsmuir had a taxable value. The evidence on this question consists of the agreement dated December 1st, 1900, between James Dunsmuir, the brother of Alexander Dunsmuir and plaintiff in this action, and Josephine Dunsmuir, the widow of Alexander Dunsmuir (pages 78-82 of the transcript), the above mentioned recitals in said decree of distribution

(transcript, pages 37-38), and the testimony of Albert W. Mowbray (transcript, pages 45-46).

Said agreement reads as follows:

This agreement made and entered into this first day of December, A. D. 1900, by and between James Dunsmuir, of Victoria, B. C., brother of Alexander Dunsmuir, deceased, the party of the first part, and Josephine Dunsmuir, of San Leandro, Alameda County, California, widow of the said Alexander Dunsmuir, deceased, the party of the second part.

#### WITNESSETH:

WHEREAS, said Alexander Dunsmuir departed this life in the city of New York, State of New York, on the 31st day of January, 1900, leaving surviving him a widow, the said Josephine Dunsmuir, party of the second part hereto, but no children; and

WHEREAS, said Alexander Dunsmuir left a last will and testament dated December 21st, 1899, by which he devised and bequeathed all of his property to his brother the said James Dunsmuir in form absolute, but in fact according to the previous understanding and agreement between the said James Dunsmuir and said Alexander Dunsmuir in his lifetime, partly in trust for the benefit of said Josephine Dunsmuir, widow, as aforesaid, and

WHEREAS, said Alexander Dunsmuir left property, both real and personal, situate in the Province of British Columbia and in the State of California; and

WHEREAS, said last will and testament was

admitted to probate in the Supreme Court of British Columbia on the 26th day of February, 1900, and all of the estate of the said deceased, both real and personal, situate in British Columbia, was thereafter by decree of the said Court distributed to said James Dunsmuir, pursuant to the terms of said last will and testament; and

WHEREAS, an authenticated copy of said last will and testament was thereafter, to wit, on the 9th day of May, 1900, admitted to probate in the Superior Court of the State of California, in and for the City and County of San Francisco, in which jurisdiction a portion of the property belonging to said decedent is situate, which ancillary administration is still pending in said last named Court; and

WHEREAS, since the death of said Alexander Dunsmuir the said James Dunsmuir, in accordance with said previous understanding and agreement between said James Dunsmuir and said Alexander Dunsmuir in his lifetime, has from time to time made suitable provisions for said Josephine Dunsmuir, widow of the said brother as aforesaid; and

WHEREAS, in consideration of the premises, the parties hereto are mutually desirous of coming to an understanding and agreement concerning said trust hereinabove referred to;

NOW, THEREFORE, this agreement witnesseth, that said James Dunsmuir, in consideration of the premises, does hereby covenant, promise and agree to and with the said Josephine Dunsmuir to pay her for and during the term of her natural life, the sum of Twenty five thousand (25,000) Dollars per annum, in gold coin

of the United States of America, payable in equal monthly installments, in the said city and county of San Francisco, commencing from the date of the death of said Alexander Dunsmuir; and also and in addition thereto the full one half of the net income arising from any and all property both real and personal, left by said Alexander Dunsmuir in the State of California, which said James Dunsmuir shall or has received from the estate of said Alexander Dunsmuir, deceased, but only after the R. Dunsmuir's Sons Company a corporation shall have paid to R. Dunsmuir Company, a corporation under the laws of British Columbia the present existing indebtedness due from it to the latter corporation, all payments on account of such income to be made monthly it being understood and agreed that the said annual payments of twenty five thousand (25,000) dollars and all payments on account of such income shall cease and determine upon the death of the said Josephine Dunsmuir, widow, as aforesaid;

And in consideration of the said payments already made and to be made as hereinabove set forth, the said Josephine Dunsmuir, widow, as aforesaid, does hereby expressly waive, relinquish and renounce, as heir at law and widow of Alexander Dunsmuir, deceased, for herself, heirs, administrators and assigns, all right, claim and interest in and to any and all of the property left by the said Alexander Dunsmuir both real and personal and wheresoever situate, and in and to all family allowance arising either under the laws of the Province of British Columbia or under the laws of the State of California;



This agreement shall and is hereby declared to be binding and obligatory on the heirs, executors, administrators and assigns of both parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first herein above written.

IN DUPLICATE.

Signed JAMES DUNSMUIR (seal)

Signed JOSEPHINE DUNSMUIR (seal)

Witness:

RUSSELL J. WILSON

M. S. WILSON

Duly acknowledged before James Mason, Notary Public in and for the City and County of San Francisco, State of California, as to the signatures of both James Dunsmuir and Josephine Dunsmuir."

Said recitals of the decree of distribution read as follows:

"And it appearing that said Alexander Dunsmuir devised and bequeathed all of his property to his brother, James Dunsmuir, but according to previous understanding and agreement said James Dunsmuir, was to make suitable provision for said Josephine Dunsmuir, widow as aforesaid, during her life;

"And it appearing that the said James Dunsmuir has since the death of said Alexander Dunsmuir in furtherance of said previous understanding and agreement entered into an agreement with the said Josephine Dunsmuir, in full settlement of her claims as widow upon the estate of said decedent, whereby he has bound himself to pay her an annuity during her lifetime.

“And it appearing by the report of the Hon. Finlay Cook, the appraiser appointed by this Court to appraise all interests in this estate subject to the collateral inheritance tax, that the present cash value of the annuity for the benefit of the said Josephine Dunsmuir, widow, as aforesaid, is in excess of the value of the property passing to James Dunsmuir, and that therefore, the property passing to said James Dunsmuir is not subject to the payment of any collateral inheritance tax.”

The testimony of said Albert W. Mowbray reads as follows:

I am a consulting actuary.

Mr. Thorne (counsel for plaintiff): Q. Assuming a person to be 49 years and one month on the 31st day of January, 1900, what would be the present value of an annuity of \$25,000 per year, payable in monthly installments during the life of that annuity?

The Court: During her expectancy?

Mr. Thorne: Yes, sir.

A. Assuming that mortality follows the combined experience table of mortality, which is the table provided by the law of the State of California for inheritance tax appraisals, and the rate of interest was in that statute 5 per cent, the present value of an annuity \$25,000 per annum, payable monthly, the first payment immediately, during the continuance of the life of a party aged 49 years, nearest birthday, would be \$302,607.50.

Mr. Thorne: Q. What table did you refer to?

A. The combined or Actuaries Experience Table of Mortality, and 5 per cent interest, which

is the basis prescribed by the inheritance tax law of the State of California. An annuity for \$25,000.00 payable monthly to a party aged 49 years, nearest birthday, according to the Combined Experience Table of Mortality, 6 per cent interest, the present value would be \$277,422.50. The same annuity, the same mortality experience, but a 7 per cent interest rate, the present value would be \$255,685.

On cross-examination the witness testified as follows:

Mr. Pier: Q. What is the usual rate of interest used by insurance companies in calculating annuities?

A. They usually use not higher than  $3\frac{1}{2}$  per cent. I think generally 3 per cent. They also use a table which shows a very much longer life than the Actuaries Experience Table because their experience with the annuities is that the class of people generally who take annuities are long lived people; and they also take a low rate of interest because they want a rate of interest low enough so that they will not fail in carrying out their contracts.

Q. Why should they use such a low percentage as 3 per cent?

A. Insurance companies have to sustain the test of the various states for solvency, for one thing, the highest rate I know of that is allowed in a test of solvency is  $3\frac{1}{2}$  per cent. The annuity business, due to the particularly long life of annuities has generally been at least not a profitable business and the lower the rate of interest the

higher the value of the annuities, so they want to increase their charges for annuities. A great many of the annuities in American companies are sold in Europe where the returns on investments are low and the rate they have to compete with corresponds.

It appears from the testimony of Mr. Mowbray that the value of the annuity made by James Dunsmuir to Josephine Dunsmuir was greater than the clear value of the estate received by James Dunsmuir upon distribution. He made the computation by virtue of the mortality tables, which the Supreme Court of the United States has held may be resorted to for the ascertainment of annuities.

*Vanderbilt vs. Eidman*, 196 U. S. 496 (quoting from *Matter of Hoffman*, 143 N. Y. 327).

And the tax provided for by the War Revenue Act is only imposable on the clear value of the legacy. See

*Billings vs. People*, 189 Ill. 472, 478, (cited and quoted with approval in *Vanderbilt vs. Eidman*, 196 U. S. 496).

The agreement between James Dunsmuir and Josephine Dunsmuir and the recitals in the decree of distribution show, although the matter is not mentioned in the will of Alexander Dunsmuir, deceased, that it was agreed between Alexander Dunsmuir and James Dunsmuir that he was to provide for her

out of Alexander Dunsmuir's property in the manner in which she has been provided for under the terms of said agreement. Such arrangement must, therefore, be held to be the manner in which the property of Alexander Dunsmuir, deceased, was really distributed, that is: it must be held to supersede his will, as was held to be the case in *McCoy vs. Gill*, 156 Fed. Rep. 985, from which we have above extensively quoted. In that case, as the Court will recollect, the contest of a will was compromised and the property distributed in accordance with the compromise which was different from the disposition of the property made by the will. The Circuit Court of the United States held that this compromise superseded the will and must be looked to for the collection of the legacy tax. Is that not really the situation in our case? In the case at bar the facts are very much stronger against the will being controlling, because therein the arrangement (not the actual execution of the agreement) for the annuity was made prior to Alexander Dunsmuir's death. Therefore this arrangement became a part of his will and the disposition made of his property by his will, as modified by this arrangement, was really the disposition made by him of his property. This arrangement being binding on James Dunsmuir, had to be recognized by the probate court and must be recognized by everybody else, including the United States. The probate court did recognize it and the decree of distribution in effect makes distribution to James Dunsmuir subject to the annuity. It further finds that by reason thereof the legacy had

no clear value. These determinations must be binding upon the United States, since it must, as was said in the last mentioned case of *McCoy vs. Gill*, look to the decree of distribution for a determination as to whom and in what manner the property of a decedent goes. The decree of distribution supersedes the will and the United States can only tax the plaintiff upon the property that was distributed to him, that is: a legacy subject to an annuity greater in value than the value of the legacy. It is true that the decree does not find the exact value of the annuity, simply finding that it is of greater value than the legacy, but the testimony of Mr. Mowbray shows its exact value, which was considerably greater than the value of the legacy.

We have considered this matter as if the arrangement for the annuity was in effect a part of the will, but, even if it were not, it certainly was a settlement and compromise of the claims of Josephine Dunsmuir to the estate of Alexander Dunsmuir, deceased (as she in the agreement, transcript, page 81, in consideration of the annuity, waives all her claims to the estate), and would, therefore, come squarely within the ruling of the United States Circuit Court in said last mentioned case of *McCoy vs. Gill* to the effect that the disposition of the property on the compromise and not the disposition made by the will controls. See also the following cases holding that, where parties compromise their various claims to an estate, moneys paid in good faith in compromise of claims or threatened litigation or of a will contest are not subject to a legacy tax:

*Estate of Hawley*, 214 Pa. St. 525;  
*Estate of Pepper*, 159 Pa. 508;  
*Estate of Kerr*, 159 Pa. St. 512;  
*Estate of Wells*, (Iowa), 120 N. W. Rep. 713;  
*English vs. Crenshaw*, 120 Tenn. 531;  
*Estate of Cook*, 187 N. Y. 253;  
*Appeal of Commonwealth*, 34 Pa. St. 204;  
*Page vs. Rives*, 1 Hughes, 297, Fed. Cas. No.  
 10666.

The legacy to James Dunsmuir having no taxable value, the tax collected thereon by defendant must be refunded.

It is not necessary to discuss the above mentioned specifications of error since they are, as above stated, all based upon the proposition that the decree of distribution is conclusive. If this Court holds it to be conclusive the rulings complained of are all erroneous. The marriage license and marriage registry are also objected to as not being based on statements of Alexander Dunsmuir and as being mere hearsay.

It is respectfully submitted that the judgment should be reversed.

ANDREW THORNE and  
 WALTON C. WEBB,  
 Attorneys for Plaintiff in Error.









No. 2386.

IN THE

**UNITED STATES CIRCUIT COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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JAMES DUNSMUIR,

*Plaintiff in Error,*

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue (Substituted in Place of August E. Muentner, Collector of Internal Revenue),

*Defendant in Error.*

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REPLY BRIEF OF DEFENDANT IN ERROR.

The points raised by the writ of error in this case may be generally classified in two subdivisions:

*First:* Was the evidence before the trial court sufficient to sustain the judgment?

*Second:* Did the trial court commit error in admitting the evidence excepted to in plaintiff's assignments of error numbers I, II, III and IV?

We submit that the first point is not properly before this court for the following reasons:

Section 649 of the Revised Statutes of the United States provides that

“Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.”

Section 700 of the Revised Statutes of the United States provides further

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.”

In this case the record shows that the judgment was general for the defendant, and that there were no special findings.

Counsel for plaintiff is in error when he says the rule has been adopted that where there are no findings, the question of insufficiency of the evidence to support the judgment cannot be raised. The court, by its judgment for the defendant, made a general finding, and the true rule is that “the finding of the court, if general, cannot be reviewed in this court “by a bill of exceptions, or in any other manner.” This rule is laid down in the following cases:

- Miller vs. Ins. Co.*, 12 Wall. 298, 79 U. S. XX 400;  
*Ins. Co. vs. Folsom*, 18 Wall. 237, 85 U. S. XXI 827;  
*Cooper vs. Omohundro*, 19 Wall. 65, 86 U. S. XXII 47;  
*Town of Martinton vs. Fairbanks*, 112 U. S. XVIII 863;  
*Town of Santa Ana vs. Frank*, 113 U. S. XXVIII 979;  
*Morris vs. Shriner*, 131 U. S. Appx. XCI, 9 L. Ed. 303;  
*Betts vs. Mugridge*, 98 U. S. 644, 25 L. Ed. 157.

Even if this were a case where the sufficiency of the evidence could be considered, the bill of exceptions does not appear to be a complete record of all the evidence taken. On page 32 of the Transcript, there is the statement: "At the trial of said cause, the following proceedings were had", but it does not appear that the proceedings recited therein were all the proceedings had. Such a bill is sufficient for a review of the exceptions to the admission of evidence specially appearing therein, but not for a review for the purpose of determining the sufficiency of the evidence.

The case of *Knowlton vs. Culver*, a Wisconsin case reported in 52 American Decisions, 156, at page 159, lays down the true rule that

"Where, however, there is a controversy as to the weight, effect, or admissibility of evidence, the bill should set forth the evidence given or offered at length, and should aver that it was all the evi-

dence given or offered at the trial, or on the point in question.”

This disposes of the points raised in the first subdivision above referred to, which are designated as the second and third points in the brief of plaintiff in error, and set forth at pages 5 and 6 thereof, with regard to the sufficiency of the evidence. They cannot in any way be considered in this court.

The only matter properly here for consideration is whether or not the decree of distribution made by the Superior Court of the City and County of San Francisco is conclusive against the defendant on the matter of domicile and residence so as to preclude the introduction of the documentary evidence designated as defendant's exhibits A, B and C, and the testimony as to the entry in the Register of Marriages of the Church of the Advent, in Oakland, California.

THE DECREE OF DISTRIBUTION IS NOT A JUDGMENT WHICH IS BINDING UPON THE DEFENDANT AS TO RESIDENCE AND DOMICILE.

The finding in the decree of distribution (Tr., p. 34) that Alexander Dunsmuir was “a resident of, and domiciled at Victoria”, is not a necessary finding for the purpose of such decree for the reason that the probate proceedings in California were based upon the fact that property of the decedent was in the City and County of San Francisco, and not upon the fact of the residence or domicile of the decedent. Nor was it necessary for the probate court to make a

finding as to residence for the purpose of assessing the state inheritance tax. That matter also rests on the location of the property.

There is no principle of law or rule of logic which makes a finding of an immaterial fact by a court in an *ex parte* proceeding conclusive as to the rights of a person not a party to the action. (*Overby vs. Searcy*, 177 U.S. 211; 47 L. Ed.

The case of *Nicholls vs. United States*, 7 Wall. 122, lays down the principle that "every government has the inherent right to protect itself against suits, and if in the liberality of legislation they are permitted, it is only on such terms and conditions as are designated by statute."

In the case of *Jesse D. Carr vs. United States*, 98 U. S. 432, where the government brought an action to acquire title to certain lands in the City of San Francisco, and where in answer by way of estoppel the defendants sought to have certain judgments in ejectment rendered by the state courts against certain officers of the government who as its agents had possession of the lots in question, it was held:

"That the United States cannot be estopped by proceedings against its tenants or agents and cannot be sued without its consent and such consent can only be given by an act of Congress; that without an act of Congress no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privilege in this respect nor lawfully consent that such a suit may be prosecuted so as to bind the government. The government can only hold possession of its property by means of its officers or agents and to allow them to be dispossessed by suit

would enable parties always to compel the government to come into court and litigate its rights. Therefore when it becomes apparent by the pleadings or the proofs that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease and its proceedings cannot be set up as an estoppel against the government."

In the case of *Siren vs. United States*, 7 Wall. 152, it was held:

"A claim for the damages occasioned by collision of vessels at sea may be enforced in admiralty by a proceeding *in rem*, except where the vessel doing the damage is the property of the United States."

"In such case the claim exists equally as if the vessel belonged to a private citizen but it cannot be enforced against the government without its consent."

It is argued that a probate proceeding is a proceeding *in rem*. If, however, a proceeding *in rem* cannot be brought against the government without its consent, it logically follows that the government is not bound by a decree in a proceeding *in rem* which has been brought without its consent.

In view of this rule, it cannot be successfully urged that the government should be foreclosed of its rights by a decree in an action which is outside any statutory permission as to itself, and to which it is not a party.

The United States has, in the Act creating the legacy tax and also in the general laws relating to internal revenue, prescribed the mode and method



by which this tax shall be collected, and only determinations made by tribunals prescribed by those various Acts of Congress are binding in any way upon the United States. The United States has not consented that the question of domicile or any other facts should be determined by the probate courts of the various states. The sole effect of a decree of distribution as far as the collection of the legacy tax is concerned, is that it is an operative instrument of transfer to determine what property under its terms passed from the decedent to the beneficiaries.

In considering the decree in this connection, only the operative words are to be considered and not the words of recital or the findings of numerous other facts which may or may not be necessary for the determination of various questions in the probate proceedings.

In short, the decree of distribution is to be considered in much the same light as a deed. The important words are the names of the parties, the words of transfer, and a description of the property transferred.

It follows from the foregoing, that the trial court committed no error in admitting in evidence over the plaintiff's objection, the will of Alexander Dunsmuir, and the Articles of Incorporation of R. Dunsmuir's Sons Co. referred to in exceptions I and II respectively.

The marriage license, the admission of which in evidence is attacked by exception III, was acted upon and actually used by Alexander Dunsmuir for the

purpose of his marriage and it must be considered that he approved and ratified the recitals therein, thereby making them his own.

“A certificate of marriage, however (in the strict sense), may nevertheless sometimes be available, not under the present hearsay exception, but by virtue of other rules of evidence. (1) If it has been signed or used by the adverse party, it may be receivable against him as an admission.”

Wigmore on Evidence, par. 1645 at p. 2013.

The fourth exception is to the ruling of the court in admitting evidence of an entry in the Register of Marriages of the Church of the Advent in Oakland, which entry is set forth at page 118 of the Transcript. The entry appears to be one made in a public record in the regular course of business. There was no attempt to show anything to the contrary. It is therefore clearly admissible under the well recognized rules of evidence.

Jones on Evidence, 2d Ed., par. 511.

*Evanston vs. Gunn*, 99 U. S. 660.

*Lewis vs. Marshall*, 5 Peters, 470 to 476.

*Hunt vs. Order of Chosen Friends*, 8 Am. State Rep. 855 to 857.

If the matter were properly before the court, a cursory examination would show the evidence to be amply sufficient. The burden is on the plaintiff to establish residence out of the State of California. The written declaration of the deceased in his letter and in the Articles of Incorporation are alone suf-

ficient to negative any such contention, but the sufficiency of the evidence is not before this court, the only matter for review here being the admissibility of certain evidence hereinabove particularly designated.

We respectfully submit that the judgment of the trial court should be affirmed.

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Attorney for Defendant in Error.

M. A. THOMAS,  
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